(1) Supreme Court, U.S.
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No. 00-418 SEP 11 2000

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IN THE

Supreme Court of the United States

WILDENSTEIN & CO., INC.,
Petitioner,

vs.

GILBERT M. MICHAELS, individually,
and doing business as VISAGE FINE ART,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

DAVID L. BACON
Counsel of Record

CURTIS A. COLE

THELEN REID & PRIEST LLP

333 South Grand Avenue, 34th Floor
Los Angeles, California 90071
(213) 621-9800

Attorneys for Petitioner
WILDENSTEIN & CO., INC.

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QUESTIONS PRESENTED

The 1990 supplemental jurisdiction statute, 28 U.S.C. § 1367(d), requires that any state statute of limitations on a state cause of action shall be tolled while it is pending in federal court and for a period of 30 days after it is dismissed, unless state law provides a longer tolling period. In this case, the federal court dismissed the state causes of action. The questions presented are:

1. Whether Congress has power under Article III and Article I, § 8 of the Constitution, consistent with the Tenth Amendment, to toll state statutes of limitations on state causes of action to be heard in state court.

2. Whether Congress has power under Article III and Article I, § 8 of the Constitution, consistent with Article IV, § 4, which guarantees each state a "Republican Form of Government," to toll state statutes of limitations on state causes of action to be heard in state court.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption of the case. Wildenstein & Co., Inc. is owned by Said Overseas Ltd. and Killeen Overseas Ltd., and it has one non-wholly owned subsidiary, 19 East 64th Street Corporation. See Sup. Ct. R. 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Wildenstein & Co., Inc. ("Wildenstein & Co."), respectfully submits that a writ of certiorari should issue to review the opinion of the Court of Appeal of the State of California entered in this proceeding on March 30, 2000. A petition for rehearing was denied on April 20, 2000. The California Supreme Court denied a petition for review on June 14, 2000.

OPINIONS AND ORDERS BELOW

The opinion of the California Court of Appeal, and its order denying rehearing, are unreported and are reprinted in the Appendix ("App.") as Apps. A and B, respectively. The order of the California Supreme Court denying review (App. C) was entered without opinion and is unreported.

JURISDICTION OF THIS COURT

The California Court of Appeal's opinion of which petitioner seeks review was filed on March 30, 2000, and its order denying a timely petition for rehearing was filed on April 20, 2000. Apps. A and B. The California Supreme Court denied a timely petition for review (App. C) on June 14, 2000. This petition is timely filed within 90 days of that denial. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statute involved in this case is subsection (d) of 28 U.S.C. § 1367 (App. F), which provides:

> The period of limitation for any claim asserted under subsection (a) . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

The provisions of the United States Constitution involved include the Tenth Amendment, which states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Also involved are the Guarantee Clause in Article IV, § 4, which states that "[t]he United States shall guarantee to every State . . . a Republican Form of Government . . .," and Article 1, § 8, cl. 18 (App. G).

STATEMENT OF THE CASE

A. Introduction

The state law causes of action which gave rise to this case arose from a series of sales by Wildenstein & Co., a New York private art dealer, of two paintings by Renoir and two by Marquet. The aggregate sales price was over $2.5 million, with the sales taking place between 1989 and 1991. The buyer, a Beverly Hills art dealer, sued Wildenstein & Co. in no less than seven complaints in four courts, claiming that he paid too much. The federal court complaints, one based on federal question and the other on diversity jurisdiction, were dismissed, as were the state causes of action. In 1999, Wildenstein & Co. obtained summary judgment on the state causes of action based on California's two and three year statutes of

limitations. On appeal, the judgment was reversed due to the tolling provision contained in 28 U.S.C. § 1367(d), which is part of the Judicial Improvements Act of 1990 (Pub. L. 101-650). Section 1367(a) provides that when a federal district court has original jurisdiction over a civil action, it may also exercise "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of such case or controversy[.]" Subsection (d) tolls state statutes of limitations for state causes of action to be heard in federal or ultimately in state court, even though the actions may be stale under the state's law. The California Court of Appeal, with review denied by the California Supreme Court, rejected Wildenstein & Co.'s constitutional challenge to this tolling provision.

Respondent Gilbert M. Michaels, doing business as Visage Fine Art, filed his seven complaints against Wildenstein & Co. between 1993 and 1997. Even though he never validly invoked the federal court's jurisdiction, in March 2000 he was able, under 28 U.S.C. § 1367(d), to obtain an opinion allowing him to pursue state causes of action in state court that were stale under California's two and three year statutes of limitations.

Michaels was in the business of purchasing fine art works for the purposes of resale. His strategy was to buy art at the lowest possible price, and then to sell the paintings quickly, for a profit. Instead of buying wholesale, Michaels chose to buy retail from another dealer and in fact a competitor, Wildenstein & Co. As a retailer of artwork, Wildenstein & Co. sells

paintings by European Masters, as well as by Impressionist and Post-Impressionist painters.

Beginning in October 1989 and ending in May 1991, Michaels purchased four paintings from Wildenstein & Co. The art market, however, fell dramatically during the worldwide recession of the early 1990's. Michaels opened an art gallery at a Beverly Hills hotel, but he was not able to sell the four paintings, and they apparently fell in value. Becoming suspicious, Michaels arranged for appraisals. Around August 25, 1992, he received the first set of estimates from Christie's auction house, estimates that left him in "a state of shock." Michaels concluded he had been defrauded out of millions of dollars.

B. Trial Court Proceedings

Michaels sued Wildenstein & Co. three times. He began with an action in the United States District Court for the Central District of California, filed on June 28, 1993 under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). In October, 1993, he filed a first amended complaint, again based on RICO, and also alleged supplemental jurisdiction causes of action under California law. Wildenstein & Co. moved to dismiss and, in the alternative, to transfer the case to the Southern District of New York. The District Court granted the transfer motion.

By December, 1993, Michaels' case became active in the Southern District of New York. The District Court required Michaels to file a RICO statement by May 24, 1995. Michaels never did. As the District Court noted, Michaels had chosen to file his lawsuit in federal court, but when the judge pressed him "to

fill out a RICO case statement," it became apparent that he "really didn't have a federal claim." Instead, he delayed and then voluntarily filed a second amended complaint in June of 1995. This pleading, which deleted the RICO claim and the California causes of action, alleged claims under New York law premised on diversity jurisdiction. Wildenstein & Co. moved to dismiss for lack of subject matter jurisdiction. Michaels again delayed and did not proceed with an evidentiary hearing suggested by the District Court to determine diversity jurisdiction. The District Court dismissed his second amended complaint for lack of diversity jurisdiction on October 6, 1995.

Returning to California, Michaels filed this second lawsuit in Los Angeles County Superior Court on October 24, 1995, alleging causes of action under California law. After Michaels filed a second amended complaint, Wildenstein & Co. successfully demurred to his breach of contract and statutory unfair competition and unfair practice claims.

On May 1, 1997, Michaels filed a third lawsuit against Wildenstein & Co. in the New York Supreme Court, under New York law, ostensibly to protect himself in the event the California case was dismissed. This was the seventh complaint that Michaels filed: two in the Central District of California, one in the Southern District of New York, three in Los Angeles County Superior Court, and one in the New York Supreme Court.

In December 1997, Wildenstein & Co. moved for summary judgment in Los Angeles Superior Court based on California's three-year statute of limitations, which barred Michaels' 1995 fraud and

misrepresentation claims, and California's two-year statute which barred his rescission and unjust enrichment claims. The trial court concluded that the statutes began to run in August and September of 1992, when Michaels suspected he had been defrauded. It therefore held that the causes of action were time-barred. (App. D 7). At the hearing, the trial court had observed there was also an interesting anomaly because, based on the date the action was originally filed in federal court, California's "five year rule" for bringing cases to trial had been exceeded. (App. E 4). Cal. Civ. Proc. Code § 583.310 (West 1984).

The trial court rejected Michaels' equitable tolling argument under California law because he had not shown he diligently pursued his claims, he was left without a judicial forum due to forces outside his control, and the defendant would not be prejudiced by the tolling:

> . . . plaintiff initially chose both his method of remedy and his forum. Plaintiff likewise chose to voluntarily withdraw [this] very remedy . . . Whatever predicament the plaintiff now finds himself in can only be laid at his own doorstep. (App. D 5).

The trial court agreed with Wildenstein Co.'s argument that Michaels' "'voluntary tactical decisions multiplied the number of actions and compounded rather than lessened the costs to courts of handling this dispute. Equitable tolling should not be applied to reward a plaintiff whose own strategic choices created the undesirable consequences the doctrine was designed to avoid.'" (App. D 6-7).

Judgment was entered for Wildenstein & Co. on August 17, 1998.

C. Court of Appeal Proceeding

Michaels appealed. On March 30, 2000, the California Court of Appeal reversed the judgment, holding that the state law claims were tolled by 28 U.S.C. § 1367(d).[1] The Court of Appeal rejected Wildenstein & Co.'s challenge of the constitutionality of the tolling provision:

> We reject Wildenstein's assertion that . . . section 1367(d) . . . 'stands in opposition to principles of state sovereignty.' (App. A 12).

On April 14, 2000, Wildenstein & Co. timely petitioned the Court of Appeal for rehearing, which was denied on April 20, 2000. (App. B 1).

D. State Supreme Court Proceeding

On May 9, 2000, Wildenstein & Co. timely petitioned for review to the California Supreme Court, again raising the constitutionality argument. The petition was denied on June 14, 2000. (App. C).

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[1] Michaels did not raise 28 U.S.C. § 1367(d) in the Los Angeles Superior Court until he added it in a footnote to supplemental papers in opposition to Wildenstein & Co.'s summary judgment motion. Wildenstein & Co. also filed supplemental papers on the same date. Under California practice, these were the final pleadings. At the hearing, Michaels advised the trial court he was "not suggesting that the statute is binding on this Court." He said: "it is a factor that the Court can look to in determining if plaintiff acted in a reasonable fashion and in good faith." (App. E 3).

REASONS FOR GRANTING THE WRIT

I. THIS CASE, INVOLVING THE SUPPLEMENTAL JURISDICTION STATUTE, RAISES THE SIGNIFICANT ISSUE OF WHETHER CONGRESS, CONSISTENT WITH THE TENTH AMENDMENT, HAS THE POWER TO TOLL STATE STATUTES OF LIMITATIONS ON STATE CAUSES OF ACTION TO BE HEARD IN STATE COURT.

The removal statutes, 28 U.S.C. §§ 1441, 1446-1447, and the 1990 supplemental jurisdiction statute, 28 U.S.C. § 1367, are of central importance as the main thoroughfares between the federal and state court systems. Not surprisingly, this Court has been called upon to review the removal statutes a number of times. *See, e.g., City of Chicago v. International College of Surgeons*, 522 U.S. 156, 174 (1997) (discussing removal, supplemental jurisdiction and abstention); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988) (discussing pendent claims). The supplemental jurisdiction statute not only expands the scope of federal jurisdiction; the sweep of its tolling provision in subsection (d) goes beyond the federal court system. The tolling period applies to purely state-law created causes of action to be heard in both federal and state court regardless of whether they are time-barred under state law.

As argued below, the Constitution does not give Congress the power to interfere in the states' ability to enact statutes of limitations for state-created causes of action, determine when an action is deemed commenced, enact service rules, decide whether to prescribe equitable tolling periods, create revival

doctrines, or enact related rules specifying the time limit for bringing an action to trial. These are state policy and lawmaking decisions of the most fundamental type for a state as a sovereign, ones by which the states govern their own laws and courts and define themselves as sovereign political entities.[2] Because subsection (d) of the supplemental jurisdiction statute encroaches on this key area, the constitutional issue presented by this petition is far-reaching.

A. Setting And Tolling Statutes of Limitations On State-Created Causes of Action Are Sovereign Functions Of State Government.

The states retain "'a residuary and inviolable sovereignty.'" *Printz v. United States*, 521 U.S. 898, 918 (1997) (citation omitted). "[I]f there is any attribute to sovereignty left to the states, it is the right of their legislatures to pass, or not to pass, laws." *Maryland v. EPA*, 530 F.2d 215, 225 (4th Cir. 1975), *vacated and*

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[2] In addition to California, *see e.g., Hull v. Central Pathology Service Medical Clinic*, 28 Cal.App.4th 1328 (Cal. App. 1994), many states have adopted equitable tolling rules which protect plaintiffs who suffered delay despite their best efforts; they do not operate to excuse delay that was of the plaintiff's own making. *See, e.g. Dayhoff v. Temsco Helicopters*, 772 P.2d 1085 (Alaska 1989); *Hogogai v. Kadota*, 145 Ariz. 227, 700 P.2d 1327 (Ariz. 1985); *Telegraph Sav. & Loan Ass'n v. Schilling*, 105 Ill.2d 166, 473 N.E.2d 921 (Ill. 1984), *cert. denied*, 474 U.S. 1070 (1985); *Torres v. Parkview Foods*, 468 N.E.2d 580 (Ind. Ct. App. 1984); *Harrison v. Chance*, 244 Mont. 215, 228, 797 P.2d 200, 208 (Mont. 1990); *Galligan v. Westfield Centre Serv.*, 82 N.J. 188, 412 A.2d 122 (N.J. 1980).

remanded for consideration of mootness sub nom., EPA v. Brown, 431 U.S. 99 (1977) (per curiam). In areas where the Constitution has not empowered Congress to act, "state law must govern because there can be no other law." *Hanna v. Plumer*, 380 U.S. 460, 471-472 (1965).

Because the states have a sovereign right to make their own laws, subsection (d) of 28 U.S.C. § 1367 has stirred questions about its validity. *See, e.g.*, Schwarzer, Tashima & Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial* § 2.161.2 (The Rutter Group 2000) (observing that "[s]ection 1367(d)'s validity would appear to depend on discerning a legitimate federal interest . . . . It is not clear what federal interest is served by tolling *a state* law statute of limitations on *state* law claims in *state* courts! The issue will have to be resolved by future case law"); Brian A. Beckcom, Note, *Pushing The Limits of the Judicial Power: Tolling State Statutes of Limitations Under 28 U.S.C. § 1367(d)*, 77 Tex.L.Rev. 1049 (1999) (arguing that subsection (d) exceeds Congress' authority under Article III of the Constitution and improperly invades the sovereignty of the states). In view of the federal and state courts' day-by-day application of this pivotal jurisdiction statute, the constitutionality of subsection (d) should be swiftly resolved.

The supplemental jurisdiction statute was designed to "provide the federal courts with statutory authority to hear supplemental claims." H.R. No. 101-734, *reprinted in* 1990 U.S.C.C.A.N. 6860, 6874. The implication of 28 U.S.C. § 1367(d) for state courts, federal courts, defense attorneys and their clients is disturbing, however. If a plaintiff does not pursue her federal lawsuit diligently, or worse, does not

pursue it in good faith and with reasonable conduct (or, worst of all, engages in forum shopping),[3] she can still refile her state causes of action in state court. The state statute of limitations will be tolled regardless of the plaintiff's behavior. Subsection (d) renders the states powerless to provide for a different result. This point is illustrated by the present case. Michaels' lawsuit against Wildenstein & Co. languished in federal court for well over two years, only to be dismissed when he finally admitted he could not provide factual support for his two theories of federal jurisdiction. Subsection (d) permitted his state causes of action to proceed in state court even though the California statutes of limitations had expired, the state's requirements for equitable tolling were not satisfied, and the state's "five year rule" for bringing cases to trial had been exceeded.

When a federal statute covers the point in dispute, the statute may have force only if it represents a valid exercise of Congress' authority under the Constitution. *See Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988). As outlined below, Congress overstepped its legislative powers when it created subsection (d) of 28 U.S.C. § 1367.

This Court has long recognized that statutes of limitations on state causes of action are fundamental to a state's "well-ordered judicial system." *See, e.g., Board of Regents, University of New York v. Tomanio*, 446 U.S. 478, 487-488 (1986) (holding that state statute of

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[3] This gamesmanship is a common tactic, unfortunately. *See, e.g., Zagano v. Fordham Univ.*, 900 F.2d 12, 13 (2d Cir. 1990); *Durham v. Florida E. Coast Ry. Co.*, 385 F.2d 366 (5th Cir. 1967).

limitations and tolling rule applied in civil rights action under 42 U.S.C. § 1983). "'In virtually all statutes of limitations the chronological length of the limitation period is *interrelated* with provisions regarding tolling, revival, and questions of application.'" *See Tomanio*, 446 U.S. at 485-486 (emphasis added) (citation omitted). A statute of limitations is not a mere technicality, but often includes the state's wisdom on the proper balance of a complex consideration of limitations and tolling provisions. State tolling rules in particular are not islands unto themselves; tolling rules are integral parts of statutes of limitations; statutes of limitations are integral parts of state-created rights. *Id.* at 487-488. This Court stated that considerations of federalism are appropriate in adjudicating suits based on the federal civil rights statute, 42 U.S.C. § 1983. *Id.* at 492. The Court explained, however, that a judicial rule which adopted the state statute of limitations, but rejected the tolling "rule actually chosen by the [State] Legislature" in favor of an ad hoc federal rule, "can scarcely be deemed a triumph of federalism." *Id.*

Throughout its history, this Court has consistently analyzed state rules governing when an action is deemed commenced, service rules, tolling rules and statutes of limitations as inseparable components of the states' judgment on the proper balancing of the competing policy interests of repose and prosecution of claims on the merits. It is these policy aspects which make the specific state law requirements part and parcel of the statute of limitations. *See, e.g., Walker v. Armco Steel Corp.*, 446 U.S. 740, 751-752 (1980) (discussing service rule). The states are fully competent to legislate and adopt rules in the statute

of limitations and equitable tolling areas. The balancing of the state's diverse policy interests being the function of the state government, the Court has not allowed a federal system of weights and measures to replace a state one. To do so would upset the balance set by the states. In essence, the Court has followed a path of federalism which "leav[es] to the states the final decision on the bulk of day-to-day matters that can best be decided by those who are closest to them." *See generally* Henry J. Friendly, *Federalism: A Forward*, 86 Yale L.J. 1018, 1034 (1977).

When the state limitations period controls in federal court, either because it has been borrowed by federal law or the suit is a diversity suit, the Court has reaffirmed the significance of the interrelationship between state statute of limitations and the state tolling periods. The Court has found that the components of state law which qualify or abridge the cause of action must control as well. *See Hardin v. Straub*, 490 U.S. 536, 542 (1989) (holding that state tolling period applies in suit under 42 U.S.C. § 1983)[4]; *Walker*, 446 U.S. at 751 (holding that in diversity suit, state law governs the determination of when the action is commenced for tolling purposes).

The Court has acknowledged that a state law rule, such as a limitation period that would completely bar recovery in a suit if brought in state court, bears on a state-created right "vitally and not merely formally or negligibly." *Guaranty Trust Co. v. York*, 326 U.S. 99,

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[4] Under 42 U.S.C. § 1988, Congress determined that gaps in federal civil rights acts may be filled by state law, as long as state law is not inconsistent with federal law.

100 (1945) (holding that state statutes of limitations are substantive and binding for diversity jurisdiction purposes under *Erie R. Co. v. Tompkins*, 304 U.S. 34 (1938)). This Court also has recognized that the diverse rules which, as a whole, comprise the state's policy on the length of the limitation period are an integral part of the "measure" of the state-created cause of action. *See, e.g., Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949). In *Ragan*, a diversity case, the Court held that a state law which defines the commencement of an action for purposes of applying the statute of limitations is an integral part of the state law and must be applied in adjudicating the action. The Court explained that "[w]here local law qualifies or abridges [the cause of action], the federal court must follow suit. Otherwise there is a different *measure* of the cause of action in one court than in the other, and the principle of [*Erie*] is transgressed." *Id.* at 533-534 (emphasis added). Because the cause of action was created by state law, the Court held that it carried the same burden and was subject to the same defenses in federal court as in state court: "We cannot give it longer life in the federal court . . . without adding something to the cause of action." *Id.*

Three years after *Tomanio*, this Court reaffirmed the significance of the interrelationship between state statutes of limitations and state tolling periods. In *Hardin*, the Court upheld the applicability of a state rule tolling a statute of limitations for prisoners in a case heard in federal court under 42 U.S.C. § 1983. *See Hardin*, 490 U.S. at 539, 542 (observing that Congress' tradition of borrowing analogous state statutes has been "based on a congressional decision to defer to

'the States judgment on the proper balance between the policies of repose and . . . enforcement embodied in the state cause of action'" (citation omitted.))

In *Walker*, a diversity case, this Court found *Ragan* "indistinguishable." The Court held that in an action arising under state law the federal court should follow the applicable state law, rather than Rule 3 of the Federal Rules of Civil Procedure, to determine when the action commenced for tolling purposes. The Court held there was no indication that Rule 3 was intended to "displace state tolling rules for purposes of state statute of limitations." *Walker*, 446 U.S. at 748, 750-751. The Court left open the issue of whether it would be beyond Congress' power under the Constitution to supply a federal rule, in a diversity case, to govern when a state statute of limitations begins to run. *See id.* at 752 n.14.

If *Walker* leaves open a constitutional question whether Congress can define the life-span of a state statute of limitations in a diversity case, there is a constitutional question whether it can define the end of the state statute by enactment of the tolling provision in 28 U.S.C. § 1367(d) for state causes of action while pending in federal court. There is an equally serious question as to Congress's power under the Constitution to toll the state statute of limitations on the state cause of action in the state court forum *after* the federal court dismissal.

Unlike Rule 3, subsection (d) of 28 U.S.C. § 1367 is expressly intended to control the issue of limitations tolling and thus displace inconsistent state law rules. This is a direct collision of federal and state law. Subsection (d) "add[s] something to the cause of action," *see Ragan*, 337 U.S. at 533-534, by giving it

new life even though the state which created the cause of action might reject it as time-barred. Subsection (d), therefore, is not merely a congressional regulation of the procedures to be followed in federal court when there is no conflicting state right protected by the Constitution, a regulation permitted by *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). Instead, subsection (d) is regulation of the substantive law to be followed both by federal courts and by state courts after dismissal of the federal action. This federal regulation markedly interferes with, and in fact usurps, the state government's right to balance the diverse and inseparable policy interests underlying limitation periods and equitable tolling rules on purely state law causes of action. Subsection (d) ties the hands of the state legislatures and judiciaries by forbidding the use not only of their own tolling rules, but of their own related statutes prescribing time limits to bring cases to trial.

Whatever may be the outer limits of state sovereignty, a core element of that sovereignty is, at the very least, state control over the creation and shaping of state law. *Erie*, 304 U.S. at 78 ("Congress has no power to declare substantive rights of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the laws of torts".) This state control includes specifying the elements of state-created causes of action. This control should also include the balancing of diverse policy interests on hearing these claims. If a state were not permitted to adopt its own equitable tolling rule, it might balance the competing interests of repose and prosecution of valid claims differently

and enact a different limitation period. The diverse interests weighed by the state cannot be unbundled.

The interrelationship analysis employed in *Tomanio* and *Hardin* is useful in determining whether subsection (d) intrudes in state autonomy. If a state's power to create causes of action and enact statutes of limitations is deemed a sovereign function, limitations periods being fundamental to a state's "well-ordered judicial system," *see Tomanio*, 446 U.S. at 487-488, then the decision to enact equitable tolling rules must be considered a sovereign function as well. So, too, is the enactment of related laws specifying when cases must be brought to trial. A corollary, no less significant, is the state's right to enforce its laws in its own courts as an independent sovereign government. If the Constitution were read otherwise, the states would be powerless to enact and enforce state laws governing such matters as taxes on land, the law of descent, trusts and estates, contracts, torts, insurance regulation, or rules of civil procedure and judicial review. *See FERC v. Mississippi*, 456 U.S. 742, 774-775 (1982) (Powell, J., concurring and dissenting) (questioning whether Congress could "pre-empt state rules of civil procedure and judicial review in classes of cases found to affect commerce").

Subsection (d) is a critical inroad on the states' independent status. If Congress can dictate a tolling period for state causes of action to be heard in federal court under supplemental jurisdiction or in state court thereafter, surely it can dictate when the cause of action accrues, the proper limitations period, revival rules, and also, for good measure, the rules of civil procedure to be applied in state court in deciding the claim on the merits and the rules for appellate

review. As stated by Judge Fernandez in his dissenting opinion in *Mack v. United States*, 66 F.3d 1025, 1035 (9th Cir. 1995), *rev'd, Printz v. United States*, 521 U.S. 898 (1997), "[t]he time to stop this journey of a thousand miles is at the first step." The constitutionality of subsection (d) should be determined promptly because the subsection impacts innumerable state law causes of action that will be heard by the federal or state courts.

The Framers of the Constitution recognized that the states had an independent sovereignty.

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite .... The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961) (J. Madison). The Framers were concerned that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny." *The Federalist* No. 47, p. 301 (J. Madison).

Subsection (d) of 28 U.S.C. § 1367 represents an excessive accumulation of powers, one which prevents the states from discharging their ordinary functions of balancing diverse policy interests and making state law. Because "the erosion of state sovereignty is likely to occur a step at a time," *South*

Carolina v. Baker, 485 U.S. 505, 533 (1988) (O'Connor, J., dissenting), any infringement of state sovereignty should be of concern. As Professor Tribe has stated:

> Of course, no one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions — in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday nothing is left but a gutted shell.

Laurence H. Tribe, *American Constitutional Law* 302 (1st ed. 1978).

This sortie made by subsection (d) into sovereign state lawmaking territory warrants swift review by this Court.

B. Subsection (d) Of 28 U.S.C. § 1367 Interferes With The Sovereign State Function Of Determining State Law.

"[T]he power to make decisions and to set policy is what gives the State its sovereign nature." *FERC*, 456 U.S. at 761. The constitutional protection of state sovereignty, moreover, is "for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992). The power to make law is an incident of state sovereignty, a power possessed by every independent government. The tolling provision in subsection (d) of 28 U.S.C. § 1367 strikes at exactly this power.

Subsection (d) of the supplemental jurisdiction statute is a sharp intrusion on state lawmaking sovereignty, one which raises an important Tenth Amendment issue. Extending the life of a state-

created cause of action was considered impermissible in *Ragan*, a diversity case, because it would "add[] something to the cause of action"; it would change the "measure" of the claim, which must be "found in local law." *Ragan*, 337 U.S. at 533-534. In many instances, subsection (d) will breathe new life into a time-barred cause of action that was created by the state legislature and is to be heard in state court. This interference with the local, ultimately political decisions of enacting statutes of limitations and interrelated tolling rules for purely state causes of action impermissibly treads on sovereign state terrain.

Because of subsection (d), the states are no longer free to decide whether to adopt equitable tolling rules in order to control a plaintiff who may be less intent on obtaining a speedy trial than on selecting forums and making the litigation so protracted that the defendant will be forced to settle. Similarly, the states are no longer free to enforce strictly their limitations periods by requiring a plaintiff, who brings an action with a state claim in federal court, to file a parallel state claim in state court and seek a judicial stay from it in order to avoid litigating at risk.

In *Hanna v. Plumer*, 380 U.S. 460, 472 (1965), the Court held that "the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it Congressional power to make rules governing the practice and pleading in those courts[.]" *Hanna* did not address whether Congress has the power, consistent with the Constitution, to make rules governing the practice and pleading on state causes of action to be adjudicated in state court. If "Congress' authority to

legislate a statute of limitations for diversity cases is not without doubt," *see* 19 Charles A. Wright, et al, *Federal Practice and Procedure* § 4509 at 266, n.17 (1996),[5] its power to toll state statutes of limitations on state causes of action to be heard in federal or ultimately state court is even more problematic.

Under the Constitution, "each state is sovereign within its own domain, governing its citizens and providing for their general welfare." *FERC*, , 456 U.S. at 777 (O'Connor, J., dissenting, joined by Burger, C.J. and Rehnquist, J.). Further, "[t]he general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Henry M. Hart, *The Relations Between State and Federal Law*, 54 Col.L.Rev. 489, 508 (1954). "Some differences in remedy and procedure are inescapable if the different governments are to retain a measure of independence in deciding how justice should be administered." *Id.* "If the differences become so conspicuous" as to require change, "the remedy does not lie in the sacrifice of the independence of either government." It lies rather in provision by the federal government of a "federal forum equally accessible to both litigants." *Id.*

The Constitution places limits on Congress' lawmaking role; some areas must be governed by

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[5] Even a defender of subsection (d) of the supplemental jurisdiction statute concedes that the "congressional power to establish the actual limitations period for a state law claim would clearly be lacking[.]" *See*, Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute – A Constitutional and Statutory Analysis*, 24 Ariz. St. L. J. 849, 988 (1992).

state law. In *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), the Court held that "Congress has no power to declare substantive rights of common law applicable in a State." "[T]here is no such thing as a power of inherent sovereignty in the government of the United States. It is a government of delegated powers, supreme within its prescribed sphere, but powerless outside of it." *Julliard v. Greenman* (*The Legal-Tender Cases*), 110 U.S. 426, 467 (1884). In *Hanna*, the Court stated that "[w]e are reminded by the Erie opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law." *Hanna*, 380 U.S. at 471-472.

This petition presents one such area where state law must govern. 28 U.S.C. § 1367(d) is an interference with the states' retained right to make state law on matters essential to their well-ordered judicial systems.

C. This Interference With State Law Violates Principles Of State Sovereignty Protected By The Tenth Amendment.

Subsection (d) of 28 U.S.C. § 1367 interferes with a system of "dual sovereignty" which is established by the Constitution, and against which federal legislation must be measured. *See Printz v. United States*, 521 U.S. 898, 918 (1997) (discussing "dual sovereignty"); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Subsection (d) steps well beyond the federal government's jurisdictional

boundaries. "'The States entered the federal system with their sovereignty intact.'" *Alden v. Maine*, 527 U.S. 706, 713 (1999) (citation omitted). The states are not "mere provinces or political corporations," *see id.* at 715, satellite offices of an all-powerful national government. Instead, "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868).

Because subsection (d) interferes with state lawmaking power, a quintessential attribute of sovereignty, it exceeds Congress' powers under Articles I and III of the Constitution, and infringes on retained states' rights in violation of the Tenth Amendment. "[I]f a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. United States*, 505 U.S. 144, 156 (1992). Subsection (d) is invalid under the Tenth Amendment, moreover, whether statutes of limitations and tolling provisions on state causes of action are regarded as substantive or procedural, or a combination. The state's power to enact law in this area is not subject to federal preemption. The Constitution does not grant Congress power to "declare substantive rights of common law applicable in a state," *Erie*, 304 U.S. at 78, nor power to decide procedural rules to be followed by state courts on state-created causes of action. "As is evident from its text . . . the Supremacy Clause enshrines as 'the supreme Law of the Land' only those federal Acts that accord with the constitutional design." *Alden*, 527 U.S. at 731; *Printz*, 521 U.S. at 924.

Subsection (d)'s encroachment into sovereign state territory also parallels, in major respects, the federal government's unconstitutional conscription of state legislatures to carry forward federal regulatory policy. *See Printz*, 521 U.S. 898; *New York*, 505 U.S. 144. The impact of subsection (d) is essentially the same as if Congress had commanded each of the state legislatures to enact provisions to toll the limitation periods on state causes of action while in federal court under supplemental jurisdiction and for 30 days after dismissal by that forum. Subsection (d) restrains the state legislatures in exactly this manner, even though its immediate impact is on the federal or state court judges who must apply the federal dictate. If it is unconstitutional to require state officials to enact or enforce a federal regulatory program, it is equally forbidden to usurp an area of state lawmaking sovereignty and require the states to adhere to a federal scheme of law if they wish to maintain their own judicial branch of government. What is infringed upon is as important as the mechanism used by Congress. Subsection (d) infringes on state sovereignty in the legislative and judicial areas, the power to craft equitable tolling periods for statutes of limitations on purely state causes of action. Subsection (d) also renders meaningless the states' related power to enact time limits for bringing a case to trial. This is terrain far removed from federal preemption. Violating the balance of federal and state powers reflected in the Constitution, subsection (d) commandeers the state lawmaking process.

This Court should grant the writ in order to uphold the core principles of state sovereignty

protected by the Tenth Amendment, principles which are abrogated by subsection (d) of 28 U.S.C. § 1367.

D. Subsection (d) Of Section 1367 Is Neither Necessary Nor Proper, In Violation Of Section 8 Of Article I Of The Constitution.

Because the tolling provision in subsection (d) of 28 U.S.C. § 1367 exceeds Congress' Article III power as an infringement on retained states' rights, it cannot be justified by the Necessary and Proper Clause in Article I, § 8, cl. 18. Congress cannot "pass laws for the accomplishment of objects not entrusted to the government," nor can it "adopt measures which are prohibited by the Constitution." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

The word "Necessary" in "Necessary and Proper" is broad, but the Clause is not an unlimited grant of authority. Instead, it is supplemental to other constitutional powers. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) at 414-415. This Court has interpreted "Necessary" to mean "useful," or "adapted to the [legislative] end." *Id.* at 419. While the threshold is rather low, Congress does not have unlimited power to decide what is useful or proper. *See* Gary Lawson & Patricia B. Granger, *The 'Proper' Scope of Federal Power: A Jurisdictional Interpretation of The Sweeping Clause*, 43 Duke L.J. 267, 274, 329 (1993).

It is difficult to see how subsection (d), insofar as it governs a state court proceeding on a state-created cause of action, is "necessary" to any federal interest. *See* Schwarzer, Tashima & Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial* § 2.161.2 (The Rutter Group 2000). If Congress felt

compelled to address tolling, it could have handled the subject in many other ways, all consistent with principles of dual sovereignty. Congress could have encouraged the state legislatures to adopt uniform tolling legislation. Congress could have provided in subsection (d) that a federal district court must condition the dismissal of the supplemental claim on the defendant's waiver of any limitations defense in a subsequent proceeding. Alternatively, Congress could have simply allowed the states to continue to govern equitable tolling on a state-by-state basis, not forcing them, as conscripts, to march to the beat of the federal drummer.

Even in states that strictly construe statutes of limitations, plaintiffs can stay proceedings pending the federal outcome. The tolling provision in subsection (d) is, therefore, not even useful to achieve its legislative end in the few states which have ostensibly declined to adopt tolling rules. In Missouri for example, a state that strictly construes its statutes of limitations, courts will stay a plaintiff's proceedings in state court pending the outcome of the same claims in federal court. *See Hill v. John Chezik Imports*, 797 S.W.2d 528, 530 (Mo. Ct. App. 1990) ("[i]n this case Appellant's state action could have been pending, but stayed, until outcome of the federal action"); *see also In re Estate of Mellon*, 314 A.2d 500, 503 (Pa. 1974) (recognizing propriety of stay in state proceedings during federal court litigation). New York has enacted a six month rule allowing the filing of a new action under certain circumstances after termination of the original suit. N.Y. Civ. Proc. Law § 205(a) (McKinney's 2000). These states, in their discretion, fashioned a remedy to the perceived

problem of prejudice. Accordingly, Congress' enactment of subsection (d) was not useful in any sense of the word.

Regardless of whether subsection (d) was "Necessary," it was not "Proper" under the Necessary and Proper Clause. In *Printz*, this Court explained that when a "'La[w] . . . for carrying into Execution'" the Commerce Clause violates the [constitutional] principle of state sovereignty[,] . . . it is not a "'Law . . . *proper*'" within the meaning of the Necessary and Proper Clause. *Printz*, 521 U.S. at 923-924 (citation omitted). The Constitution and federal statutes "do not harness state power for national purposes." *FERC*, 456 U.S. at 777 (O'Connor, J., dissenting, joined by Burger, C.J. and Rehnquist, J.). This harnessing of state power is exactly what Congress has attempted in subsection (d).

Congress' weighing of the benefits of subsection (d) to prospective plaintiffs does not allow the subsection to escape constitutional scrutiny. In *Printz*, which held unconstitutional a portion of a federal statute that conscripted states officers directly to enforce a federal regulatory program, the Court stated: "no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty." *See Printz*, 521 U.S. at 935. Subsection (d) offends the very principle of state sovereignty; accordingly, a balancing analysis is not appropriate.

II. THE CASE ALSO RAISES THE SIGNIFICANT ISSUE OF WHETHER THIS FEDERAL TOLLING PROVISION CONTRAVENES THE RIGHT OF THE PEOPLE OF EACH STATE TO PASS THEIR OWN LAWS, AND THUS VIOLATES THE GUARANTEE OF A REPUBLICAN FORM OF GOVERNMENT IN SECTION 4 OF ARTICLE IV OF THE CONSTITUTION.

"[T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. United States*, 505 U.S. at 157. The states' retained sovereignty is reflected in the Constitution's many facets, including the Guarantee Clause, Article IV, § 4. *See id.*

The Guarantee Clause "'presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights.'" *Printz*, 521 U.S. at 919 (citation omitted). The Guarantee Clause provides that the United States shall "guarantee to every State" a "Republican Form of Government." At its core, the Guarantee Clause protects the right of the people of each state to "choose their own officers for governmental administration," and to "pass *their own laws* in virtue of the legislative power possessed in representative bodies." *In re Duncan*, 139 U.S. 449, 461 (1889) (emphasis added).

Nothing in the Constitution suggests that the states, which generally regarded the setting of statutes of limitations as within the forum state's legislative jurisdiction, were of the mind to surrender

that discretionary power to a newly-formed federal government. At the time the Constitution was adopted, each state could enact its statute of limitations as a question of local policy and regulation. In *Sun Oil Co. v. Wortman*, 486 U.S. 717, 725-726 (1988), this Court held that a forum state was free to apply its own statute of limitations to claims governed by the substantive law of other states despite the Full Faith and Credit Clause. The Court explained that the society which adopted the Constitution regarded statutes of limitations as "procedural restrictions fashioned by *each jurisdiction* for its *own courts*." *Id.* (emphasis added).

Regardless of its goals, subsection (d) of 28 U.S.C. § 1367 is an infringement on the sovereign right of the state legislatures and courts, in their own wisdom, to enact statutes of limitations and adopt equitable tolling periods for state causes of action. In responding to the question, "Who is to judge of the *necessity* and *propriety* of the laws to be passed for executing the powers of the Union," Alexander Hamilton foresaw the broad constitutional issue presented by this petition:

> The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the federal legislature should attempt to vary the law of descent in any State, would it not be evidence that in making such an attempt it had

exceeded its jurisdiction and infringed upon that of the State?[6]

Subsection (d) brings to life Hamilton's concern over federal legislation that intrudes on state lawmaking sovereignty. State tolling periods on state-created causes of action remain an inseparable policy element of statutes of limitations, which in turn are fundamental to a state's "well-ordered judicial system," *Board of Regents, University of New York v. Tomanio*, 446 U.S. 478, 487 (1986).

Subsection (d) of 28 U.S.C. § 1367 upsets the balance between the powers of the federal and state governments. Only this Court's intervention can restore that essential balance which is protected by the Tenth Amendment and Article IV, § 4 of the Constitution.

CONCLUSION

For the foregoing reasons, petitioner urges the Court to grant a writ of certiorari in this case.

Respectfully submitted,

DAVID L. BACON
Counsel of Record

CURTIS A. COLE
THELEN REID & PRIEST LLP

Attorneys for Petitioner
WILDENSTEIN & CO., INC.

September 11, 2000

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[6] *The Federalist* No. 33, pp. 203-204 (A. Hamilton).

NOT TO BE PUBLISHED IN
THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION ONE

GILBERT N. MICHAELS, Plaintiff and Appellant, v. WILDENSTEIN & CO., INC., Defendant and Respondent.	B126656 (Super. Ct. No.BC137720) Court of Appeal – Second District Filed March 30, 2000 Joseph A. Lane, Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen M. Lachs and Peter D. Lichtman, Judges. Reversed and remanded with directions.

Arthur E. Schwimmer; A. Charles Dell'Ario; Steiner & Saffer, David Paul Steiner and Sherry M. Saffer for Plaintiff and Appellant.

Thelen Reid & Priest, Curtis A. Cole, Gayle I. Jenkins and Natasha T. Shum for Defendant and Respondent.

In a timely fashion, a plaintiff filed suit in federal court. Two years later, the federal court agreed with the defendant that there was no subject matter jurisdiction and dismissed the federal suit. Eighteen days later, the plaintiff sued the defendant in superior court. The defendant demurred, and two of the plaintiff's causes of action were disposed of by the trial court. The defendant then moved for summary judgment, asserting the bar of limitations. The motion was granted, thereby disposing of the plaintiff's remaining claims. The plaintiff appeals. We reverse.

FACTS

Between October 1989 and May 1991, Gilbert Michaels purchased four paintings from Wildenstein & Co., Inc., a New York art dealer, for a total of about $2.5 million.[1] At the times of Michaels's purchases, Wildenstein's representatives knew that Michaels intended to open a gallery and to resell the paintings at a profit. According to Michaels, he was told by the folks at Wildenstein that he was getting the paintings for "well below their market value" and, in the "near future," would be able to sell them at a profit.

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[1] On October 30, 1989, Michaels purchased Pierre-Auguste Renoir's "Trois Grenades et Deux Pommes" for $375,000. On October 10, 1990, Michaels purchased Albert Marguet's "Femme Nue Debout dans un Atelier" for $490,000. On December 8, 1990, Michaels purchased Renoir's "L'Etang a Essoyes" for $650,000. On May 6, 1991, Michaels purchased Marquet's "Pin a Saint Tropez" for $1,025,000.

In May 1992, Michaels opened a gallery at the Peninsula Hotel in Beverly Hills. In July, Michaels asked Wildenstein about the current value of his paintings (so he would know how to price them for resale). In August, Wildenstein explained that, due to a decline in the art market, the paintings were probably worth no more than the amounts Michaels had paid for them. Michaels then turned to Sotheby's and Christie's, and was advised in August that the paintings were all worth considerably less than the amounts Michaels had paid for them.[2] Michaels asked Christie's and Sotheby's to double-check their estimates. In September and October, Christie's and Sotheby's confirmed to Michaels that his paintings were then worth about $1.5 million less than the total he paid for them.

Michaels, aware of the depressed state of the art market, then asked Sotheby's to value the paintings as of the dates Michaels had purchased them from Wildenstein. On December 14, 1992, Sotheby's advised Michaels that, in the opinion of its experts,

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[2] Christie's opined that Renoir's "Trois Grenades et Deux Pommes" (for which Michaels had paid $375,000) was worth $70,000 to $90,000; Sotheby's put it somewhere between $140,000 and $180,000. Christie's opined that Marquet's "Femme Due Debout dans un Atelier" (for which Michaels had paid $490,000) was worth between $80,000 to $100,000; Sotheby's agreed. Christie's opined that Renoir's "L'Etang a Essoyes" (for which Michaels had paid $1,025,000) was worth between $120,000 and $160,000; Sotheby's put it at somewhere between $250,000 and $350,000.

the paintings for which Michaels had paid about $2.5 million had been worth somewhere between $830,000 and $1.1 million at the time of Michaels's purchases.[3]

In June 1993, in Los Angeles, Michaels sued Wildenstein and others in federal court. In November, the case was transferred to the Southern District of New York. In June 1995, Michaels filed a second amended complaint. That fall, Wildenstein filed a motion to dismiss. On October 6, the district court dismissed Michael's action based upon "lack of diversity jurisdiction and in the discretion of the Court." On October 24, Michaels filed this action. By his first amended complaint filed in April 1996, Michaels alleged seven causes of action against Wildenstein (plus two against others who are not parties to this appeal). In August, the trial court (Hon. Stephen Lachs) sustained Wildenstein's demurrers to two of Michaels" causes of action. In

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[3] More specifically, Sotheby's opined that Renoir's "Trois Grenades et Deux Pommes" (for which Michaels had paid $375,000) had then been worth between $250,000 and $300,000; that Marquet's "Femme Nue Debout dans un Atelier" (for which Michaels had paid $490,000) had then been worth between $80,000 and $100,000; that Renoir's "L'Etang a Essoyes" (for which Michaels had paid $650,000) had then been worth between $400,000 and $600,000; and that Marquet's "Pin a Saint Tropez" (for which Michaels had paid $1,025,000) had then been worth between $100,000 and $150,000. In September 1993, Christie's estimated the value of the four paintings, as of the dates of their purchase by Michaels, at $200,000 to $250,000, $120,000 to $160,000, $300,000 to $350,000 and $150,000 to $200,000, respectively.

July 1998, the trial court (Hon. Peter D. Lichtman) granted Wildenstein'' motion for summary judgment, finding that the remaining causes of action were barred by limitations. Michaels appeals from the judgment thereafter entered.

DISCUSSION

I.

The two causes of action to which Wildenstein's demurrers were sustained were for "unfair competition" and "payment of secret commissions" (Bus. & Prof. Code, §§ 17200, 17045, 17047, 17048.)[4] Michaels says he pled facts sufficient to state these causes of action, and that Wildenstein's demurrers to his eighth and ninth causes of action should have been overruled. We agree.

A.

To plead a cause of action under section 172000 et. seq., it is necessary only to allege that members of the public are likely to be deceived. "Allegations of actual deception, reasonable reliance, and damage are unnecessary." (*Committee on children's Television, Inc. v. General Foods Corp.* (1983) 5 Cal.3d 197, 211.) Where, as here, the sufficiency of an unfair competition claim is attacked by demurrer, the truth of the plaintiff's factual allegations is admitted, and questions about the plaintiff's ability to prove his allegations are irrelevant. (*Id.* at pp. 213-214; see also

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[4] Undesignated statutory references in this part of our discussion are to the Business and Professions Code.

ABC Internat. Traders, Inc. v. Matsushita Electric Corp. (1997) 14 Cal.4th 1247, 1253.)

Michaels alleged (among other things) that, before he negotiated his purchases from Wildenstein, he had entered an agreement with an art expert, Larry Ross, pursuant to which Ross was to locate art works for acquisition by Michaels for resale at a profit. Michaels agreed to pay a commission to Ross, and Ross agreed that he would not accept a commission from any seller of art. Wildenstein knew about the agreement between Michaels and Ross, and knew Ross was not to accept a commission from any seller. Wildenstein nevertheless paid "secret commissions" to Ross, then failed to disclose those payments. Michaels alleged that the payments to Ross by Wildenstein were acts of "commercial bribery" in violation of Penal Code section 641.3 and, therefore, acts of unfair competition that "were likely to mislead the general public as well as [Michaels] in that . . . Wildenstein . . . knew or should have known that the art market was falling, yet continued to sell art to [Michaels] and other members of the general public without disclosing the significant drop in the art market, rather selling artwork as if the market was still at a high. . . . [¶] [These] unlawful, unfair and fraudulent business practices . . . constitute a threat to members of the public in California and to [Michaels] in that, unless stopped, Wildenstein . . . shall continue to make erroneous representations regarding the value of its artwork to other unsuspecting members of the public of California . . . [and] shall continue to pay secret commissions . . . constituting commercial

bribery . . . to their various art agents and runners who are bringing [to] Wildenstein . . . California clients who are purchasing works of art from Wildenstein . . . at inflated prices because of such secret commissions and commercial bribery."

In addition, alleged Michaels, Wildenstein "actively participated in a scheme designed to defraud consumers and divert customers from competitors based upon the representations that Wildenstein," one of the "world's oldest and leading old master galleries, was a joint venturer with the Pace Gallery in establishing Pace-Wildenstein [a Beverly Hills gallery that opened in September 1995]." There are more allegations about the Pace-Wildenstein gallery, and press releases allegedly approved by Wildenstein are attached to and incorporated into Michaels's first amended complaint.

B.

Wildenstein simply ignores the allegations quoted above and contends that Michaels is trying to extend the theory of unfair competition to "claims for little more than 'buyer's remorse' that arise in the context of fine art." According to Wildenstein, an art dealer's statement of opinion about the future value of fine art is mere "puffing" or "sales talk," and it cannot rise to the level of an actionable misrepresentation. Wildenstein assumes that "Michaels and Ross were partners," then concludes there could not possibly be anything actionable about Wildenstein's decision to pay a commission to Ross, notwithstanding an agreement between Michaels and Ross that forbade

Ross's acceptance of a payment from any source other than Michaels (and Wildenstein's knowledge of that agreement). These arguments are for a jury, and are not the stuff of which demurrers are made.

In short, Michaels has stated with reasonable particularity the facts supporting the statutory elements of the alleged violations. (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 [by prescribing "any unlawful" business practice, section 17200 borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable]; *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 367 [violations of the Penal Code are indisputably "unlawful" within the meaning of section 172000].) No more was required.

II.

The trial court resolved Michaels's other causes of action in favor of Wildenstein on the ground that Michaels's claims were barred by limitations. Michaels offers several reasons to conclude otherwise. We agree with one of those reasons and therefore do not discuss the others.

A.

The federal court dismissed Michaels's complaint of October 6, 1995. This action was filed 18 days later, on October 24, 1995. Under 28 U.S.C. section 1367(d), this action was timely filed.[5]

Section 1367 defines the federal courts' supplemental jurisdiction by providing that, except as provided therein or "otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. . . ." (§ 1367(a).) Following other provisions about when the district courts do and don't have supplemental jurisdiction, subdivision (d) of section 1367 provides as follows: *"The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subdivision (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period."* (Emphasis added.)

Since this action was filed within 30 days after Michaels's federal claims were dismissed, it would

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[5] Undesignated statutory references in this part of our opinion are to Title 28 of the United States Code.

appear to follow ineluctably that this action was timely.

B.

To avoid the effect of section 1367(d), Wildenstein contends that Michaels should not be allowed to "recharacterize the nature of his federal lawsuit." Wildenstein's assumption is wrong, and so too is his conclusion.

When Michaels filed his federal action in 1993, he invoked federal jurisdiction by including a RICO claim. That claim remained part of Michaels's lawsuit until June 1995, at which time Michaels filed his second amended complaint, dropped his RICO claim, and (for the first time) invoked federal jurisdiction on an allegation of diversity of citizenship. Wildenstein then moved to dismiss on the ground that diversity was incomplete. The federal court agreed, found that all parties were not of diverse citizenship at the time the federal action was filed, and concluded that, as a matter of discretion, it would decline to exercise supplemental jurisdiction over Michaels's remaining claims.

From the transcript of the hearing on Wildenstein's motion to dismiss, it is obvious that the district court judge understood that her ruling would not terminate this dispute, and that Michaels's claims would simply proceed in a different forum. After the court announced its intent to dismiss, Wildenstein's lawyer mentioned that there were "some pending depositions" and suggested that they might be

"moot." The judge disagreed, commenting that, "I don't see why. You are going to need discovery wherever you go." Plainly, the district court judge was operating on the assumption that the case was governed by section 1367(d), and that a state court action could be filed (in New York or California) within 30 days.[6]

Although Wildenstein's argument is not altogether clear, it seems to be that Michaels was required to "plead" the fact that, with the district court's permission, Michaels is pursuing this action under section 1367(d). Wildenstein cites no authority for this novel concept and we know of none. Not surprisingly, Wildenstein does not explain how it could possibly have been prejudiced by Michaels's failure to allege that everyone was gathered together in Los Angeles, Superior Court because Wildenstein had moved to dismiss the action that was previously pending in federal court in the Southern District of New York.

---

[6] Although it is true, as the trial court noted, that Michaels voluntarily abandoned his RICO claim, there is no suggestion that it was "absolutely devoid of merit or obviously frivolous" at the time Michaels's original complaint was filed in federal court. Accordingly, the strength of the RICO claim does not affect Michaels's right to rely on section 1367(d). (*Glider v. PGA Tour, Inc.* (9th Cir. 1991) 936 F.2d 417, 421.) In this regard, we note that, for the entire time the RICO claim was pending – from June 1993 to June 1995 – Wildenstein did not challenge it on the merits, notwithstanding that Wildenstein did move to dismiss on procedural grounds, and did move to change venue.

We reject Wildenstein's assertion that, as applied to it, section 1367(d) "would operate in an unconstitutional fashion because it stands in opposition to principles of state sovereignty." Although Wildenstein says this case is distinguishable from *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, Wildenstein doesn't say how. We see no distinction. As Division Seven of our Court explained in *Kolani*, section 1367(d) does not create a novel concept. It simply codifies the doctrine of equitable tolling that applies when a plaintiff with several options reasonably pursues one remedy instead of another. Where, as here, (1) the defendant received timely notice of the plaintiff's claim by the filing of the federal action, (2) the defendant was not prejudiced because it had the opportunity to use the discovery tools available in the federal action to interview witnesses and gather evidence, and (3) the plaintiff's reasonableness has been shown by the timely filing of the California action within the 30-day period permitted by section 1367(d), the defendant's rights are fully protected. (*Kolani v. Gluska, supra*, 64 Cal.App.4th at pp. 409-410.)[7]

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[7] When the trial court granted Wildenstein's motion for summary judgment, it stated that Michaels's decision to pursue a RICO claim in federal court "was clearly not a choice between alternative remedies designed to lessen the extent of his injuries." Instead, said the trial court, Michaels was attempting to "maximize his damages." We are not aware of any rule that prohibits a plaintiff's efforts to "lessen the extent of his injuries" by "maximizing" the amount of damages he will be able to recover if he wins. The federal district court judge did not find

(footnote continued on next page)

Section 1367(d) does not, as Wildenstein asserts, require a state court to "hear state claims that would otherwise be stale." To the contrary, as *Kolani* recognized, it places a reasonable *limit on the plaintiff's existing right* to re-file in state court after a federal action has been dismissed. We do not see how a case filed within the time permitted by section 1367(d) could reasonably be described as "stale."

In short, Wildenstein is in the same position it would have been in had this case been filed in state court in the first instance.

(footnote continued from previous page)

fault with Michaels's pursuit of the RICO claim or with his ultimate decision to abandon it. Neither do we, nor do we find anything in this record to suggest that Michaels acted in bad faith.

DISPOSITION

The judgment is reversed and the cause is remanded to the trial court with directions to (1) vacate its orders (a) sustaining Wildenstein's demurrers to Michaels's eighth and ninth causes of action and (b) granting Wildenstein's motion for summary judgment as to Michaels's remaining causes of action; (2) to enter new orders overruling the demurrers and denying the motion for summary judgment; (3) to make such other orders as are necessary to place Michaels's claims at issue; and (4) to place the case on track for trial. Michaels is awarded his costs of appeal.

NOT TO BE PUBLISHED.

VOGEL (Miriam A.), J.

We concur:

SPENCER, P.J.

MASTERSON, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 1

DATE: April 20, 2000

Curtis A. Cole
Thelen, Reid & Priest LLP
333 South Grand Avenue, Suite 3400
Los Angeles, California 90071-3193

MICHAELS, GILBERT N.
Plaintiff And Appellant
v.
WILDENSTEIN & CO. INC.
Defendant-Respondent

B126656
Los Angeles County No. BC137720

THE COURT:

Respondent's petition for rehearing is denied.

Second Appellate District, Division One, No. B126656
S087611

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

SUPREME COURT
FILED

June 14, 2000
Frederick K. Ohlrich Clerk
Deputy

GILBERT N. MICHAEL, Appellant

v.

WILDENSTEIN & CO., INC., Respondent

Respondent's petition for review DENIED. The request for an order directing publication of the opinion is denied.

George
Chief Justice

ORIGINAL FILED
JUL 22 1998
LOS ANGELES
SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

GILBERT N. MICHAELS, individually and doing business as VISAGE FINE ART, Plaintiff, vs. WILDENSTEIN & CO., INC., a New York corporation; MULTI MEDIA VISUAL ART, INC., a Nevada corporation; LAWRENCE ROSS, also known as LARRY ROSS, an individual, Defendants.	Case No. BC 137 720 **COURT'S RULING RE: MOTION FOR SUMMARY JUDGMENT BY DEFENDANT, WILDENSTEIN & CO., INC.** Hearings Held: February 18, 1998 and July 10, 1998

On February 18, 1998, this court heard arguments by counsel regarding a motion for summary judgment brought by the defendant, Wildenstein & Co., Inc. At

that time this court made the following rulings and findings.

(i) Plaintiffs rescission and unjust enrichment causes of action were barred by the two-year statute of limitations;

(ii) Plaintiff suspected or should have suspected that his injury was caused by the defendants' wrongdoing in August or September of 1992; and

(iii) The three-year statute of limitations for any and all fraud causes of action expired prior to the filing of the instant action (the case at bar was filed October 24, 1995).

A more detailed explanation of the court's prior ruling and findings is set forth in the court's minute order of February 18, 1998. The only issue remaining as of February 18, 1998 was whether or not plaintiff could successfully invoke the doctrine of equitable tolling in order to avoid the consequences of the statute of limitations. Further briefing as to this point was requested by the court and a hearing was originally set for March 27, 1998. At the request of all counsel, the hearing set for March 27, 1998 was continued to June of 1998. Due to the court's calendar, this court reset the further arguments of counsel as to the equitable tolling doctrine for July 18, 1998.

Having read and considered the points and authorities submitted by each side and having considered the oral arguments of counsel, this court now proceeds with its ruling.

In order to invoke the doctrine of equitable tolling, the plaintiff is required to establish that all three prongs have been met.

First, plaintiff must have diligently pursued his claims.

Second, the fact that plaintiff is left without a judicial forum for resolution must be attributable to forces outside the control of plaintiff.

Third, the defendant must not be prejudiced by the application of the doctrine.

The three factors mentioned above are discussed in the case of *Hull v. Central Pathology Service* (2nd Dist., 1994) 28 Cal.App.4th 1328, 1336. The essence of the dispute, now before the court, regarding equitable tolling is that the moving and responding parties disagree as to whether plaintiffs good faith must exist in the filing of the first action, the second action or both. The moving party (defendant Wildenstein & Co.) argues strenuously for the proposition that in order to qualify for equitable tolling a plaintiff must have acted reasonably and in good faith throughout the litigation, not just in the brief moment between the end of the first case and the commencement of the second. This court agrees with the moving party's premise.

Applying this premise to the case at hand, this court believes and concludes that the plaintiff cannot invoke the doctrine of equitable tolling. The plaintiff, Gilbert Michaels, originally filed an action against the defendant in the United States District Court, Central District of California in or about June of 1993. In that

action the plaintiff Michaels voluntarily chose to pursue his claims of wrongdoing through the Federal Civil Rico Statute. After issues concerning venue were ultimately resolved, plaintiff's federal action was transferred to the U.S. District Court for the Southern District of New York. After two years of pre-trial wrangling concerning the Rico claims, the plaintiff chose to voluntarily abandon those claims upon the filing of a second amended complaint. Plaintiff Michaels' decision to pursue a Rico claim in federal court for two years was clearly not a choice between alternative remedies designed to lessen the extent of his injuries. Plaintiff Michaels strategically chose a remedy to maximize the extent of damages he could recover. This point is not to be overlooked since the California Supreme Court noted in the case of *Addison v. State* (1978) 21 Cal.3d 313, 317, that the doctrine of equitable tolling is afforded a litigant who, in good faith, pursues a legal remedy designed to lessen the extent of his injuries or damages. Additionally, it should be noted that plaintiff likewise chose the federal forum since Rico relief is and was available in California state court [*see: Cianci v. Superior Court* (1985) 40 Cal.3d 903, 916].

The federal judge's comments concerning plaintiffs pursuit of the Rico claim is quite instructive in this regard:

"THE COURT: When you focused on it, you really didn't have a federal claim. It's not even that the federal claim was dismissed, you withdrew it. I don't penalize you for that. Normally, when I dismiss a federal claim and there is no independent ground of

jurisdiction, I send the case to state court where it belongs.

If this federal claim had not been asserted, from my point of view, this case would have been brought in the state court. As a matter of policy, generally speaking, this court does not encourage shaky federal claims by holding on to state litigation which came to federal court just because of the presence of a shaky federal claim.

Regardless of how it was disposed of, and this has nothing to do with motivation, it has to do with the fact that the court would like to encourage litigants to carefully consider whether they really have federal questions that belong in federal court." [Hearing before the Honorable Miriam Goldman Cedarbaum, September 22, 1995.]

In the matter before this court, it cannot be ignored that plaintiff initially chose both his method of remedy and his forum. Plaintiff likewise chose to voluntarily withdraw the very remedy that he consciously chose to pursue. Whatever predicament the plaintiff now finds himself in can only be laid at his own doorstep. This is not a case where the plaintiff was deprived of his day in court by way of forces outside of his control. Plaintiff was in the court of his choosing and after two years of pursuing the claim of his choosing, he decided to abandon it.

The fundamental purpose behind the doctrine of equitable tolling is to permit the court to intervene with equitable powers when it believes that an unjust result might occur. The points made by the defendant

moving party in its supplemental papers describe and articulate precisely why the doctrine cannot be invoked by the plaintiff Michaels. This court sets forth herein below in *haec verba* moving party's position in this regard:

"Applying equitable tolling to this case would subvert two of the very policies that support the doctrine. Equitable tolling was designed to avoid the hardship on plaintiffs of being compelled to pursue simultaneously several duplicative actions on the same set of facts. It also reduces the costs incurred by courts and other dispute resolution tribunals, at least where a disposition in the first case makes a second proceeding unnecessary, easier, or cheaper to resolve. *Collier v. City of Pasadena* (1983) Cal.App.3d 917, 926.

In this case plaintiff was never compelled to pursue his case in more than one forum. He voluntarily chose to file first in federal court, to pursue the case there for more than two years, to eliminate the basis for the federal court's jurisdiction, to file next in the California state court, and to file a third suit in the New York Supreme Court. Exs. 1, 9, 13. To this day, plaintiff continues to demand that three different courts address issues surrounding his case. Exs. 13, 14. Plaintiff's voluntary tactical decisions multiplied the number of actions and compounded rather than lessened the costs to courts of handling this dispute. Equitable tolling should not be applied to reward a plaintiff whose own strategic choices created the undesirable consequences the doctrine was designed to avoid." [See: Moving Party's Supplemental Brief, pp. 4-5, filed July 9, 1998.]

Simply put, this court believes that moving party's argument against the assertion of equitable tolling best reflects the position of this court. In light of all facts and circumstances surrounding this case, and in further light of *Hull v. Central Pathology, supra,* and the *Estate of Gianna Blue v. County of Los Angeles* (9th Cir. 1997) 120 F.3d 982, this court declines to invoke the doctrine of equitable tolling and grants moving party's motion for summary judgment. Moving party is to prepare a judgment in conformity with this court's ruling. A copy of this court's ruling is sent via U.S. mail to all parties appearing in this action. The trial date is vacated and all hearing dates are likewise vacated.

As to the notice of settlement filed on July 9, 1998 as to the defendants, Multi Media Visual Art and Lawrence Ross, this court sets an OSC for September 2, 1998 at 8:30 a.m. as to why the case should not be dismissed for failure to consummate the settlement. If the court is in receipt of a dismissal prior to September 2, 1998, the OSC will be discharged on the court's own motion.

DATED: JUL 22 1998

PETER D. LICHTMAN
PETER D. LICHTMAN
Judge of the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 49 HON. PETER D. LICHTMAN, JUDGE

GILBERT N. MICHAELS, et al., Plaintiff, vs. WILDENSTEIN & CO., INC., et al, Defendant.	No. BC 137720
AND RELATED CROSS-ACTION	

REPORTER'S TRANSCRIPT

THURSDAY, JULY 16, 1998

APPEARANCES:

For the Plaintiff: STEINER & SAFFER
BY: SHERRY M. SAFFER, Esquire
-and-
BY: DAVID PAUL STEINER, Esquire

22nd Floor
2121 Avenue of the Stars
Los Angeles, California 90067-5010
(310) 557-8422

For the Defendant: THELEN, REID & PRIEST, LLP
BY: HELEN J. LAUDERDALE, Esquire
Suite 3400
333 South Grand Avenue
Los Angeles, California 90071-3193
(310) 621-9800

WENDY SCOTT, CSR #10549
Official Court Reporter

* * * *

[Page 12, lines 8-11]

[Counsel for Michaels:] I'm not suggesting that that statute is binding on this Court. I'm suggesting that it is a factor that the Court can look to in determining if plaintiff acted in a reasonable fashion and in good faith. And, at least in Kolani, the court was persuaded that since the plaintiff in that action had not filed his second claim until 78 days after the supplemental claims were dismissed, he did not act in a timely fashion, and therefore equitable tolling was not applied.

* * * *

[Page 16, lines 19-28; Page 17, lines 1-2]

[The Court:] ... So now from the initial time of discovery to 1995, three years – over three years has elapsed, and the whole purpose behind the statute of limitations is to not let claims go stale.

And now, what's also interesting, if I were to invoke equitable tolling, I have an anomaly where essentially cases are supposed to be prosecuted, we are now in 1998, and we are beyond the five-year statue if you take the date from the time this action was originally pursued in federal court. That's an interesting anomaly. This case is now beyond the five-year statute where ordinarily this case would have been tried or dismissed. ...

28 U.S.C. § 1367 provides:

§ 1367. Supplemental Jurisdiction.

(a) Except as provided in subsection (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

United States Constitution, Article I, § 8, cl. 18:

[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . . .

Supreme Court, U.S.
FILED
OCT 24 2000
CLERK

(2)

No. 00-418

In The

Supreme Court of the United States

WILDENSTEIN & CO., INC.,

Petitioner,

vs.

GILBERT N. MICHAELS, individually,
and doing business as VISAGE FINE ART,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeal
Of The State Of California

RESPONDENT'S BRIEF IN OPPOSITION

David Paul Steiner
Sherry M. Saffer
Steiner & Saffer
1925 Century Park East, Suite 2350
Los Angeles, California 90067-2737
Telephone: 310-557-8422

A. Charles Dell'Ario
Counsel of Record
201 Nineteenth Street, Suite 200
Oakland, California 94612-4117
Telephone: 510-763-7700
Attorneys for Respondent Gilbert N. Michaels

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

26pp

QUESTION PRESENTED

28 U.S.C. § 1367 codifies the supplemental jurisdiction of federal courts to hear state law claims which arise from the same Article III "case or controversy"as a case within the federal court's original jurisdiction. Subdivision (d) provides that the statute of limitations on such a pendent state claim is tolled while the case is in the federal court and for a period of 30 days following any dismissal by the federal court.

Does the well-settled power of Congress to provide for supplemental federal jurisdiction of state claims extend to providing for the effect of a timely federal filing on the state statute of limitations if the supplemental state claims are ultimately dismissed in an exercise of the federal court's discretion?

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JURISDICTION OF THIS COURT[1]

Although petitioner invokes 28 U.S.C. § 1257(a) as the basis of this court's jurisdiction, jurisdiction is lacking because an adequate state ground exists for the decision of the California Court of Appeal. That is, Wildenstein & Co. (hereafter Wildenstein or petitioner) asserted in the trial court and again on appeal that Michaels' claims were barred because they were stale and because respondent Gilbert N. Michaels (hereafter Michaels or respondent) had not brought himself within the parameters of the California state law "equitable tolling" doctrine. In rejecting Wildenstein's argument, the Court of Appeal found section 1367(d)'s plain language controlling. However, the court also found that section 1367(d) was in harmony with the state common law doctrine because all the elements required to invoke the state common law doctrine were necessarily met when Michaels refiled his state claims just eighteen days after they were dismissed by the federal judge in the exercise of her discretion under section 1367(c)(3). Contrary to Wildenstein's claim that section 1367(d) offends state sovereignty, the California court found that it "codified" state policy. "We do not see how a case filed within the time permitted by section 1367(d) could reasonably be described as 'stale.' " Petitioner's App. A at p. A-13.

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[1] Petitioner's statement of jurisdiction fails to indicate its compliance with the requirements of Supreme Court Rule 29.4(b). The petition calls into question the constitutionality of an act of Congress and 28 U.S.C. § 2403(a) may apply.

STATEMENT OF THE CASE[2]

A. Introduction

Gilbert Michaels purchased four works of fine art from Wildenstein & Co. on the fraudulent representation that at the collective $2,540,000 purchase price, Michaels could resell them for a fair profit. In fact, the collective fair market value of the paintings was no more than $1,150,000. That is, Michaels was cheated by at least $1,390,000 before any consideration of his profit on resale. In addition, and contrary to the express agreement of the parties, Wildenstein suborned Michaels' agent, Ross. Wildenstein secretly paid Ross at least $75,000 in commissions over and above the $122,500 Michaels paid Ross for the same sales. On the state of the record, under California law, Wildenstein has admitted these allegations for the purpose of its motion for summary judgment and demurrer in the trial court.

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[2] Wildenstein takes considerable liberty with the omission in Rule 14.1(g) of any requirement that the statement of the case be supported by citations to the record below. It discusses the issues as though the trial court properly made findings which were binding on the California appellate courts. The trial court dismissed Michaels' claims on demurrer for failure to state a claim (cf. Fed.R.Civ.Pro. 12(b)(6)) or summary judgment. No factual findings in the trial court are made on such proceedings which bind the California appellate courts. A demurrer admits all the properly pleaded facts in the complaint. *Quelimane Co., Inc. v. Stewart Title Guaranty Co.*, 19 Cal.4th 26, 38, 77 Cal.Rptr.2d 709 (1998). Summary judgments are reviewed "de novo." *Artiglio v. Corning Inc.*, 18 Cal.4th 604, 612, 76 Cal.Rptr.2d 479 (1998). In other words, under California state law, the opinions of the trial judge were irrelevant to the proceedings in the California appellate courts.

In June 1993, Michaels sued Wildenstein in the Central District of California alleging a RICO claim and several state law claims. Wildenstein has conceded that this filing was timely under the state statute of limitations. In November 1993, the case was transferred to the Southern District of New York on Wildenstein's motion. In June 1995, Michaels filed a second amended complaint which omitted his RICO claim. On motion by Wildenstein, the district court found that no diversity jurisdiction existed. Exercising its discretion under 28 U.S.C. § 1367(c)(3), the court then dismissed the pendent state claims. Michaels refiled the claims in the Los Angeles County Superior Court eighteen days later.

B. Facts[3]

> Between October 1989 and May 1991, Gilbert Michaels purchased four paintings from Wildenstein & Co., Inc., a New York art dealer, for a total of about $2.5 million.[4] At the times of Michaels' purchases, Wildenstein's representatives knew that Michaels intended to open a gallery and to resell the paintings at a profit.

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[3] Michaels quotes the facts as stated in the opinion of the California Court of Appeal. These factual statements supercede any contrary trial court factual findings.

[4] "[Court's footnote] On October 30, 1989, Michaels purchased Pierre-Auguste Renoir's "Trois Grenades et Deux Pommes" for $375,000. On October 10, 1990, Michaels purchased Albert Marquet's "Femme Nue Debout dans un Atelier" for $490,000. On December 8, 1990, Michaels purchased Renoir's L'Etang a Essoyes" for $650,000. On May 6, 1991, Michaels purchased Marquet's "Pin a Saint Tropez" for $1,025,000.

According to Michaels, he was told by the folks at Wildenstein that he was getting the paintings for "well below their market value" and, in the "near future," would be able to sell them at a profit.[5]

In May 1992, Michaels opened a gallery at the Peninsula Hotel in Beverly Hills. In July, Michaels asked Wildenstein about the current value of his paintings (so he would know how to price them for resale). In August, Wildenstein explained that, due to a decline in the art market, the paintings were probably worth no more than the amounts Michaels had paid for them. Michaels then turned to Sotheby's and Christie's, and was advised in August that the paintings were all worth considerably less than the amounts Michaels had paid for them.[6] Michaels asked Christie's and Sotheby's to double-check their estimates. In September and October,

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[5] [Michaels' footnote] The petition incorrectly claims that Michaels paid retail. Petition at 3. The truth is that Michaels paid more than retail. Wildenstein's fraudulent representation was that it was selling to Michaels at wholesale.

[6] "[Court's footnote] Christie's opined that Renoir's "Trois Grenades et Deux Pommes" (for which Michaels had paid $375,000) was worth $70,000 to $90,000; Sotheby's put it somewhere between $140,000 and $180,000. Christie's opined that Marquet's "Femme Nue Debout dans un Atelier" (for which Michaels had paid $490,000) was worth between $80,000 to $100,000; Sotheby's agreed. Christie's opined that Renoir's "L'Etang a Essoyes" (for which Michaels had paid $650,000) was worth $140,000 to $180,000; Sotheby's put it between $400,000 and $600,000. Christie's opined that Marquet's "Pin a Saint Tropez" (for which Michaels had paid $1,025,000) was worth between $120,000 and $160,000; Sotheby's put it at somewhere between $250,000 to $350,000.

Christie's and Sotheby's confirmed to Michaels that his paintings were then worth about $1.5 million less than the total he paid for them.

Michaels, aware of the depressed state of the art market, then asked Sotheby's to value the paintings as of the dates Michaels had purchased them from Wildenstein. On December 14, 1992, Sotheby's advised Michaels that, in the opinion of its experts, the paintings for which Michaels had paid about $2.5 million had been worth somewhere between $830,000 and $1.1 million at the time of Michaels' purchases.[7] Petitioner's App. A at A2-A4.

Michaels [later discovered] that, before he negotiated his purchases from Wildenstein, he had entered an agreement with an art expert, Larry Ross, pursuant to which Ross was to locate art works for acquisition by Michaels for resale at a profit. Michaels agreed to pay a commission to Ross, and Ross agreed that he would not accept a commission from any seller of art. Wildenstein knew about the agreement between

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[7] "[Court's footnote] More specifically, Sotheby's opined that Renoir's "Trois Grenades et Deux Pommes" (for which Michaels had paid $375,000) had then been worth between $250,000 and $300,000; that Marquet's "Femme Nue Debout dans un Atelier" (for which Michaels had paid $490,000) had then been worth between $80,000 and $100,000; that Renoir's "L'Etang a Essoyes" (for which Michaels had paid $650,000) had then been worth between $400,000 and $600,000; and that Marquet's "Pin a Saint Tropez" (for which Michaels had paid $1,025,000) had then been worth between $100,000 and $150,000. In September 1993, Christie's estimated the value of the four paintings, as of the dates of their purchase by Michaels, at $200,000 to $250,000, $120,000 to $160,000, $300,000 to $350,000 and $150,000 to $200,000, respectively.

> Michaels and Ross, and knew Ross was not to accept a commission from any seller. Wildenstein nevertheless paid "secret commissions" to Ross, then failed to disclose those payments. Michaels alleged that the payments to Ross by Wildenstein were acts of "commercial bribery" in violation of [Cal.] Penal Code section 641.3 and, therefore, acts of unfair competition. . . .

Petitioner's App. A at A6.

C. Trial Court Proceedings

Michaels filed suit in the federal district court for the Central District of California on June 28, 1993. He alleged a federal RICO claim and pendent state claims all arising out of Wildenstein's fraudulent art sales to him. Wildenstein's bribery of Ross was not discovered until later when Wildenstein produced checks to Ross in discovery. (CT[8] 552.) Wildenstein conceded that this filing was timely as to the state law pendent claims. "Under the California discovery rule, plaintiff had until August 26, 1993, to file this lawsuit. . . . " Wildenstein's Respondent's Brief in the Court of Appeal at 23. Thus, as of June 1993, Wildenstein had notice of and an opportunity to defend against Michaels' claims.

Wildenstein and its co-defendants aggressively attacked the pleadings. Wildenstein filed a motion to change venue and a motion attacking the RICO claim substantively for failure to state a claim. Fed.R.Civ.Pro. 12(b)(6). (CT 1053, 1064.) Wildenstein did not, however, challenge the federal court's subject matter jurisdiction

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[8] "CT" refers to the clerk's transcript on appeal below.

on the basis that the RICO claim was "insubstantial" from a jurisdictional point of view. The motion to dismiss was resolved by stipulation that Michaels would file a first amended complaint. (CT 1077.) The case was transferred to the Southern District of New York as Wildenstein requested.

No motion to attack the RICO claim was made in New York, either. No attempt to seek sanctions for bad faith was made. Most importantly, the New York court never adjudicated the claim or otherwise ruled on it. In 1995, Michaels filed a second amended complaint by which he withdrew his RICO claim and sought to base jurisdiction on diversity.

Again the California Court of Appeal states the facts aptly:

> Although it is true, as the trial court noted, that Michaels voluntarily abandoned his RICO claim, there is no suggestion that it was "absolutely devoid of merit or obviously frivolous" at the time Michaels' original complaint was filed in federal court. Accordingly, the strength of the RICO claim does not affect Michaels' right to rely on section 1367(d).[9] (Citation). In this

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[9] [Michaels' footnote] Wildenstein makes a serious misstatement when it asserts in the petition (at 3) that Michaels never validly invoked the federal court's jurisdiction. The California Court of Appeal expressly ruled otherwise, and the New York federal court's rulings only makes sense if the court believed the supplemental jurisdiction was properly invoked. "Once a federal court has ascertained that a plaintiff's jurisdiction-conferring claims are not 'insubstantial on their face,' (Citation.) 'no further consideration of the merits of the

> regard, we note that, for the entire time the RICO claim was pending – from June 1993 to June 1995 – Wildenstein did not challenge it on the merits, notwithstanding that Wildenstein did move to dismiss on procedural grounds, and did move to change venue.

Petitioner's App. A at A11 fn. 6.

Wildenstein attacked the second amended complaint on the ground "that diversity was incomplete." The federal court agreed, found that all parties were not of diverse citizenship at the time the federal action was filed, and concluded that, as a matter of discretion, it would decline to exercise supplemental jurisdiction over Michaels' remaining claims.

> From the transcript of the hearing on Wildenstein's motion to dismiss, it is obvious that the district court judge understood that her ruling would not terminate this dispute, and that Michaels' claims would simply proceed in a different forum. After the court announced its intent to dismiss, Wildenstein's lawyer mentioned that there were "some pending depositions" and suggested that they might all be "moot." The judge disagreed, commenting that, "I don't see why. You are going to need discovery wherever you go." Plainly, the district court judge was operating on the assumption that the case was governed by section 1367(d), and that a

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claim(s) is relevant to a determination of the court's jurisdiction of the subject matter.' (Citation.)" *Hagans v. Levine*, 415 U.S. 528, 542 n.10, 94 S.Ct. 1372, 1382 n.10 (1974); *Gilder v. P.G.A. Tour, Inc.*, 936 F.2d 417, 421 (9th Cir. 1991).

> state court action could be filed (in New York or California) within 30 days.

Petitioner's App. A at A10-A11.

> The federal district court judge did not find fault with Michaels' pursuit of the RICO claim or with his ultimate decision to abandon it. Neither do we [the California Court of Appeal] nor do we find anything in this record to suggest that Michaels acted in bad faith.

Petitioner's App. A at A12 fn. 7.

Michaels filed his Los Angeles County Superior Court action on October 24, 1995, just eighteen days after the federal district court dismissed his state law claims. "In short, Wildenstein [was] in the same position it would have been had this case been filed in the state court in the first instance." Petitioner's App. at A13.

REASONS FOR REFUSING THE WRIT

Because Section 1367(d) Merely "Codified" California State Equitable Tolling Principles The Decision Below Rests On An "Adequate State Ground."

To be sure, the Court of Appeal concluded that the plain language of section 1367(d) controlled the disposition of the case.[10] But, as an alternate ground for its conclusion, the Court of Appeal followed the ruling of a

[10] "Since this action was filed within 30 days after Michaels's federal claims were dismissed, it would appear to follow ineluctably that his action was timely." Petitioner's App. A at A9-A10.

prior California Court of Appeal, *Kolani v. Gluska*, 64 Cal.App.4th 402, 75 Cal.Rptr.2d 257 (1998). This "adequate state ground" defeats this court's jurisdiction to review the matter. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

As summarized in *Addison* [*v. State of California*, 21 Cal.3d 313, 317, 146 Cal.Rptr. 224 (1978)], the requirements for equitable tolling are that defendant must receive timely notice of the claims, defendant must suffer no prejudice, and plaintiff must act reasonably and in good faith. (Ibid.) 28 United States Code section 1367, subdivision (d) codifies the tolling doctrine and applies it in all supplemental jurisdiction cases where the pendent state claims are dismissed without prejudice. Two of the three requirements for "equitable tolling" are met in all such cases. Defendant receives notice of the claims, from the filing and service of the federal suit. Defense is not prejudiced, since defendant, if diligent, will interview witnesses and gather evidence to meet the claims in the federal suit. The third requirement, reasonable conduct by plaintiff, is addressed by subdivision (d)'s requirement that the second suit be filed within 30 days after dismissal of the pendent claims. This part of subdivision (d) substitutes a bright-line rule in place of the case-by-case analysis of "reasonableness" found in the equitable tolling cases. It affords plaintiff a reasonable time within which to get the case refiled. At the same time, it upholds the policy of the statute of limitations, by limiting the time to refile, and thus assuring that claims will be promptly pursued in any subsequent action. *Kolani v. Gluska, supra*, 64 Cal.App.4th at 409-410, 75 Cal.Rptr.2d at 261.

In other words, the California court concluded that the California equitable tolling principles corresponded

with the application of section 1367(d). It ruled on the facts before it that, because the plaintiffs had refiled their state law claims 78 days after the claims had been dismissed by the federal court, they were too late. The court held that under the California view of equitable tolling, a plaintiff who re-files within 30 days of a federal dismissal acts reasonably within the meaning of California's doctrine.

In its petition to this court, as it did below, Wildenstein rails at Michaels, alleging "bad faith." Wildenstein argues that section 1367(d) interferes with California state sovereignty because it precludes a consideration of the good or bad faith of the plaintiff in pursuing his state claims in federal court as part of a federal claim. The problem with Wildenstein's position is that it was rejected as a matter of fact by the federal judge in New York and by the California Court of Appeal when it reversed the Los Angeles County Superior Court judge. Wildenstein renewed its claim in the California Supreme Court but the court was also unmoved.

To make its "bad faith" claim in this court, Wildenstein has gone so far as to misstate the record. According to Wildenstein, Michaels "never validly invoked the federal court's jurisdiction." Petition at 3. Wildenstein is wrong. "The federal district court judge did not find fault with Michaels' pursuit of the RICO claim or with his ultimate decision to abandon it. Neither do we [the California Court of Appeal] nor do we find anything in this record to suggest that Michaels acted in bad faith." Petitioner's App. A at A12 fn. 7.

The California Court of Appeal found no offense to California sovereignty in section 1367(d).

> Although Wildenstein says this case is distinguishable from *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, Wildenstein doesn't say how. We see no distinction. As Division Seven of our Court explained in *Kolani*, section 1367(d) does not create a novel concept. It simply codifies the doctrine of equitable tolling that applies when a plaintiff with several options reasonably pursues one remedy instead of another.

Petitioner's App. A at A12.

Section 1367(d) did not compel the California Court of Appeal to decide the case in a manner contrary to California's equitable tolling doctrine. According to the California court, a plaintiff such as Michaels who files a timely state claim in federal court, serves the defendant and re-files within 30 days of an ultimate federal dismissal, brings himself within the principles of the California equitable tolling doctrine as a matter of California law. Michaels is mindful of this court's decision in *Michigan v. Long*, 463 U.S. 1032 (1983). He believes that this separate ground for the Court of Appeal's decision is not so "interwoven" with the federal ground as to lack independence. Because the decision below rests on this "adequate state ground" the petition should be denied.

The Congressional Power To Provide For Supplemental Jurisdiction Includes The Power To Provide For The Effect On The Statute Of Limitations While The Case Is In Federal Court.

No question exists that the Congress has the power to provide a codification of former doctrines of pendent

and ancillary jurisdiction. *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 165 (1997). Congress also has the power to establish exceptions to that jurisdiction. *Id.*, 522 U.S. at 169.

Supplemental jurisdiction only operates on claims created by state law. The federal power is thus properly exercised in determining the effect on the state statutes of limitations of bringing state claims in federal court under supplemental jurisdiction. Otherwise, results would vary state-by-state.

In order for a plaintiff to rely successfully on subdivision (d), he must still file the federal case with the pendent state claims in a timely manner. Section 1367, subdivision (a) merely grants to the federal courts supplemental jurisdiction over all state claims which arise out of the same case or controversy as the federal claim on which jurisdiction is predicated. It extends no statute of limitations.

The state statute of limitations is maintained. The plaintiff must still bring himself within whatever time period limits the assertion of the particular cause of action. The relevant dates to be considered are the filing date in federal court, the dismissal date in federal court and the refiling date in state court.[11]

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[11] California's policy regarding the application of statutes of limitations is not offended by this analysis. The California Supreme Court recently made this observation about the operation of statutes of limitations: "Inasmuch as [the statute of limitations] "necessarily fix[es]" a "definite period[ ] of time" (Citation), it operates conclusively across the board, and not flexibly on a case-by-case basis. (Citations.) That is to say, a

For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either. *Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

Since the enactment of section 1367 in 1990, only one of the sixteen reported state cases[12] mentioning subdivision (d) has addressed the constitutional claim here

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cause of action brought by a plaintiff within the limitations period applicable thereto is not barred, even if, in fact, the former is stale and the latter dilatory; contrariwise, a cause of action brought by a plaintiff outside such period is barred, even if, in fact, the former is fresh and the latter diligent." *Norgart v. The Upjohn Company*, 21 Cal.4th 383, 395, 87 Cal.Rptr.2d 453, 472 (1999).

[12] *Kendrick v. City of Eureka*, 82 Cal.App.4th 364, 98 Cal.Rptr.2d 153 (2000); *Harter v. Vernon*, 532 S.E.2d 836 (N.C.App. 2000); *Stevens v. ARCO Management of Washington D.C., Inc.*, 751 A.2d 995 (D.C. 2000); *Fennell v. Stephenson*, 528 S.E.2d 911 (N.C.App. 2000) review granted 8-25-00; *Raygor v. University of Minnesota*, 604 N.W.2d 128, (Minn.App. 2000) Review granted 3-28-00; *Wallin v. Minnesota Dept. of Corrections*, 598 N.W.2d 393 (Minn.App.1999); *Capitol House Preservation Co. v. Perryman Consultants, Inc.* 725 So.2d 523 (La.App.1998); *Kolani v. Gluska, supra*; *Rothmeier v. Investment Advisers, Inc.*, 556 N.W.2d 590 (Minn.App. 1996); *Dalal v. Alliant Techsystems Inc.*, 934 P.2d 830 (Colo.App. 1996); *Pointer v. Western Heights Independent School Dist.*, 919 P.2d 5 (Okla.1996); *Davis v. Commonwealth*, 660 A.2d 157 (Pa.Cmwlth., 1995); *Black v. Florida Dept. of Corrections*, 652 So.2d 1291 (Fla.App. 1995); *Roden v. Wright*, 646 So.2d 605 (Ala. 1994); *Grider v. USX Corp.*, 847 P.2d 779 (Okla. 1993); *Roden v. Wright*, 611 So.2d 333 (Ala. 1992).

made. That court, the North Carolina Court of Appeals, concluded: "The tolling of a statute of limitations is a regulation of the 'judicial process' and, therefore, is procedural. Accordingly, the Congress had the authority, pursuant to the Necessary and Proper Clause of the United States Constitution, to enact section 1367(d)." *Fennell v. Stephenson*, 528 S.E.2nd 911, 914-915. (N.C. App. 2000), review granted, (8-25-00). No other state appellate decision has intimated that its state's sovereignty is impermissibly impaired by subdivision (d).

The fact that subdivision (d) dictates the effect of a timely federal filing on a refiled state action does not mean that Congress has overreached. The federal courts may enter rulings which affect state claims substantively even though those cases are to be tried in state courts. In *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), a unanimous court held that a federal district court may decide questions of personal jurisdiction before addressing its own subject matter jurisdiction without offending the dignity of the state court, even if that determination precludes relitigation of the personal jurisdiction question in the state courts. This issue preclusion effect did not impermissibly interfere with states' rights. *Id.*, 526 U.S. at 586-587.

If the Congress lacked power to provide for the statute of limitations effect on state law claims properly and timely filed in federal court, a chilling effect on federal claims that varied from state to state would result. This court has concluded such a result would be undesirable.

In *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988), the court considered whether the district courts

had power had the power to remand improperly removed cases even though the removal statute, on its face, only authorized the court to dismiss such claims. The court analyzed the dilemma facing a plaintiff with a federal claim and a state claim arising out of the same set of operational facts. "Thus, a rule that would require federal courts to dismiss a removed case that is not suitable for resolution in a federal court would operate not only to foreclose some plaintiffs from litigating their state-law claims, but also to chill other plaintiffs from bringing their federal-law claims." *Id.*, 484 U.S. at 352 n. 9.

The *Carnegie-Mellon* court also foresaw an undesirable tendency of federal courts to retain pendent state law claims, which they would otherwise dismiss, if concerns existed that state statute of limitations might have expired. *Id.*, 484 U.S. at 352 n.10. Most importantly for the resolution of the question presented by this case, the *Carnegie-Mellon* court noted the power of Congress to enact provisions in the removal statute which provided for or prohibited dismissal or remand of removed cases, with whatever attendant effect that might have on the state statute of limitations. *Id.*, 484 U.S. at 354.

The cases relied upon by Wildenstein are simply off the point. Subdivision (d) does not affect state statute of limitations in state law cases. *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949). The limitation period applies to the filing of the claim in federal court. If the state claim is barred when filed in the federal court, section 1367(d) does not revive it. In addition, any provisions tolling the statute of limitations pre-filing are preserved. *Board of Regents v. Tomanio*, 446 U.S. 478 (1980). The state provisions defining the "commencement" of an

action for purposes of the statute of limitations are preserved. *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980).

The holding of *Walker* was the result of the absence of a conflicting rule of federal procedure. The court did not reach the question of whether Congress had the power to create a "commencement" rule that was uniform and controlling. *Id.*, 446 U.S. at 749-750, 752. The court's holding in *Tomanio* likewise was the result of the absence of a controlling federal rule. *Tomanio,* 446 U.S. at 488.

Wildenstein sees subdivision (d) as promoting lack of diligence, bad faith and, "worst of all," "forum shopping." Petition at 10-11. According to Wildenstein, a state court will be unable to punish the plaintiff who engages in such conduct. Wildenstein makes no sense. In order for subdivision (d) to operate, the plaintiff must have made a timely filing in federal court and a timely refiling in state court. No California policy is offended. The California Supreme Court recently held that statutes of limitations operate on a "bright line" basis. "[A] cause of action brought by a plaintiff within the limitations period applicable thereto is not barred, even if, in fact, the former is stale and the latter dilatory." *Norgart v. The Upjohn Co., supra,* 21 Cal.4th at 395, 87 Cal.Rptr.2d at 472.

Concerns of forum shopping are not grounds to reject an otherwise proper rule or statute. "[A] plaintiff already has the option for shopping for a forum with the most favorable law." *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (1990); *see also Carnegie-Mellon University v. Cohill, supra,* 484 U.S. at 357.

Even if the considerations Wildenstein raises were grounds for this court to take up the question of whether

section 1367(d) is constitutional, this case is a poor vehicle for addressing it. Although Wildenstein wishes otherwise, to the extent of misstating the record on this point, Michaels neither lacked diligence nor lacked good faith nor engaged in impermissible forum shopping. Wildenstein conceded that Michaels' 1993 federal filing was timely as to his state law claims. Wildenstein's Respondent's Brief in the California Court of Appeal at 23.

The California Court of Appeal rejected Wildenstein's claims that Michaels had engaged in impermissible forum shopping and bad faith. "We are not aware of any rule that prohibits a plaintiff's efforts 'to lessen the extent of his injuries' by 'maximizing' the amount of damages he will be able to recover if he wins. The federal district court judge did not find fault with Michaels' pursuit of the RICO claim or with his ultimate decision to abandon it. Neither do we nor do we find anything in this record to suggest that Michaels acted in bad faith." Petitioner's App. A at A12 n. 7.

Subdivision (d) provides a uniform rule for state claims brought initially in federal court under the supplemental jurisdiction statute, section 1367. It upholds the dignity of the state law statutes of limitations and any pre-filing tolling of them. It avoids any chilling of federal claims that would occur if a plaintiff risked forfeiting his state causes of action by joining them with a federal claim.

> "Our Federalism" does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these

> courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments.

Ruhrgas AG v. Marathon Oil Co., supra, 526 U.S. at 587.

Subdivision (d) represents a suitable balance between the interests of the states and federal government. It is a proper exercise of the congressional power to regulate practice in the federal courts.

CONCLUSION

The California Court of Appeal held that, by refiling his state claims within thirty days of their federal dismissal, Michaels satisfied the three requirements for the application of the California equitable tolling doctrine. Wildenstein's rights were "fully protected." Petitioner's App. A at A12. "We do not see how a case filed within the time permitted by section 1367(d) could reasonably be described as 'stale.' " *Id.,* at A13. This presents an adequate state ground for the court's decision.

Subdivision (d) does not interfere with state sovereignty, the Guaranty Clause or the Tenth Amendment. The state statute of limitations is preserved. The California Court of Appeal concluded aptly: "In short, Wildenstein is in the same position it would have been had this

case been filed in state court in the first instance." Petitioner's App. A at A13.

The petition should be denied.

Respectfully submitted,

DAVID PAUL STEINER
SHERRY M. SAFFER
STEINER & SAFFER
1925 Century Park East, Suite 2350
Los Angeles, California 90067-2737
Telephone: 310-557-8422

A. CHARLES DELL'ARIO
Counsel of Record
201 Nineteenth Street, Suite 200
Oakland, California 94612-4117
Telephone: 510-763-7700
Attorneys for Respondent Gilbert N. Michaels

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No. 00-418

IN THE

Supreme Court of the United States

WILDENSTEIN & CO., INC.,
Petitioner,

vs.

GILBERT N. MICHAELS, individually,
and doing business as VISAGE FINE ART,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

PETITIONER'S REPLY BRIEF

DAVID L. BACON
Counsel of Record

CURTIS A. COLE

THELEN REID & PRIEST LLP

333 South Grand Avenue, 34th Floor
Los Angeles, California 90071
(213) 621-9800

Attorneys for Petitioner
WILDENSTEIN & CO., INC.

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STATEMENT UNDER RULE 29.4(B)

Since the proceeding draws into question the constitutionality of 28 U.S.C. § 1367(d), an Act of Congress, and neither the United States nor any federal department, office, agency, officer, or employee thereof is a party, it is possible that 28 U.S.C. § 2403(a) may be applicable.[1]

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[1] This pleading and the Petition for Writ of Certiorari are being served on the Solicitor General. The scope of application of 28 U.S.C. § 2403(a) is unsettled, however. It is not clear from the lower court case law whether the statute, and in particular its reference to an Act of Congress "affecting the public interest," apply to a federal statute that touches solely on District of Columbia or state law interests, as distinguished from federal interests.

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PETITIONER'S REPLY BRIEF

I. INTRODUCTION

The Petition for Writ of Certiorari properly invokes this Court's jurisdiction and the writ should be granted so that the Court may determine whether subsection (d) of 28 U.S.C. § 1367, the 1990 supplemental jurisdiction statute, is consistent with the Tenth Amendment and Article IV, § 4 of the Constitution.

28 U.S.C. § 1367(d) is not federal regulation of the practice and pleadings in federal court, regulation permissible under *Hanna v. Plumer*, 380 U.S. 460, 472 (1965), the decision upon which respondent Michaels relies. Instead, subsection (d) is a regulation of the substantive and procedural law governing state causes of action to be heard in state courts *after* dismissal of the federal action. By tolling state statutes of limitations on state causes of action to be heard in state courts, subsection (d) intrudes deeply into what has been considered for over two centuries the exclusive domain of state lawmaking power - the state's power either to enact statutes of limitations and enforce them strictly, or to adopt equitable tolling rules requiring the plaintiff to show it diligently pursued its claims in the first action, it was left without a judicial forum due to forces outside its control, and the defendant would not be prejudiced by the tolling. Subsection (d) does not codify any of these diverse state rules; rather, it displaces them entirely with a mechanical, federal 30-day tolling period.

II. THIS COURT HAS JURISDICTION: BY PLAIN STATEMENT, THE CALIFORNIA COURT OF APPEAL'S DECISION IS BASED ON 28 U.S.C. § 1367(d), NOT ON A SEPARATE AND INDEPENDENT STATE GROUND.

Contrary to Michaels' assertion, the California Court of Appeal's decision on the tolling of the statutes of limitations is, by plain statement, based on 28 U.S.C. § 1367(d), not on a separate and independent state ground. (Brief in Opposition at 9-12). This Court, therefore, has jurisdiction pursuant to *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983).

After noting that Michaels "offers several reasons to conclude" his claims were not "barred by limitations," the California Court of Appeal stated: "[w]e agree with *one* of these reasons and therefore do not discuss the others." (Emphasis added). (App. A 8.) The court immediately stated:

> The Federal Court dismissed Michaels' complaint on October 6, 1995. This action was filed 18 days later, on October 24, 1995. Under 28 U.S.C. § 1367(d), this action was timely filed. (App. A 9).

In making its holding, the court rejected Wildenstein & Co.'s argument that subsection (d) was unconstitutional as "stand[ing] in opposition to principles of state sovereignty." (App. A 12.)

III. FURTHER, THE DECISION BELOW IS NOT SUPPORTED BY A SEPARATE AND INDEPENDENT STATE GROUND. SUBSECTION (d) OF THE SUPPLEMENTAL JURISDICTION STATUTE DISPLACES, RATHER THAN CODIFIES, STATE STATUTE OF LIMITATIONS RULES INCLUDING THE CALIFORNIA EQUITABLE TOLLING DOCTRINE WHICH GOVERNS A CHALLENGE TO THE PLAINTIFF'S DILIGENCE AND GOOD FAITH IN PURSUING THE FIRST ACTION.

Contrary to Michaels' assertion, the California Court of Appeal's decision is not based on a separate, and independent state ground, much less one that is tenable. Even accepting for purposes of argument Michaels' view that the decision should be read as based partially on a state ground, the federal ground would still be primary and the state ground would be neither separate nor independent, but closely interwoven with the court's conclusion that the suit may proceed because Michaels complied with the 30-day filing requirement in 28 U.S.C. § 1367(d). Additionally, any purported state ground would not be tenable.

Subsection (d) of 28 U.S.C. § 1367 entirely displaces, rather than codifies, state statute of limitations rules governing the filing of a second action, including equitable tolling doctrines. In fact, some states strictly enforce their statutory periods for bringing suit while other states, such as California, use equitable tolling rules which include a focus on the plaintiff's conduct in the first action and do not

excuse delay that was of the plaintiff's own making. (Petition at 9, n.2 and 26-27.) Subsection (d) replaces these strictly-enforced state statutory periods or state equitable tolling rules with a mechanical, federal 30-day tolling period.

Further, California's equitable tolling doctrines are not the simple, single-dimension rule that Michaels proclaims. (Brief in Opposition at 10-11, 19.) Equitable tolling rules vary depending on the circumstances to which they must apply. The special rule invoked by the California Court of Appeal and Michaels applies *only* when no question has been raised about the plaintiff's good faith and diligence in pursuing the first action. *See e.g., Addison v. State of California,* 21 Cal.3d 313 (1978) (not challenging the plaintiff's diligence in pursuing the first action, defendants contended that equitable tolling was inapplicable to actions against public entities). This is not such a case.

True, the decision below stated that subsection (d) of 28 U.S.C. § 1367 codifies the doctrine of equitable tolling that applies when a plaintiff with several options reasonably pursues one remedy instead of another, and that the inquiry is on the plaintiff's conduct between the dismissal of the first action and the filing of the second. (App. A 12.) For this proposition, the court cited *Kolani v. Gluska,* 64 Cal.App.4th 402 (Cal.App. 1998). (App. A 12.) In *Kolani,* however, there was no challenge — as there is here — to the plaintiff's good faith and diligence in pursuing the federal court action: at issue only was plaintiff's 78-day delay in filing the second action. In turn, *Kolani* relied on *Addison, supra,* which did not

involve a challenge to the plaintiff's diligence and good faith in pursuing the first action.

Under well-settled California Supreme Court precedent from which the California court could not depart, when the defendant challenges the plaintiff's conduct in the first action the doctrine of equitable tolling does not turn on a simple, one dimensional look at the plaintiff's conduct *after* the first suit was dismissed. Instead, in such cases the California doctrine of equitable tolling requires a multi-faceted review that centers on three elements: whether the plaintiff can show it diligently and in good faith filed and pursued its claims in the first action, it was left without a judicial forum due to forces outside its control, and the defendant would not be prejudiced by the tolling. *Bollinger v. National Fire Ins. Co.*, 25 Cal.2d 399, 410 (1944); *Hull v. Central Pathology Service Medical Clinic*, 28 Cal.App.4th 1328, 1336 (Cal.App. 1994); *see also Estate of Blue v. County of Los Angeles*, 120 F.3d 982, 985 (9th Cir. 1997) (stating court's belief that California equitable tolling rule would not apply when a claim had been pending for a long time and was then voluntarily dismissed and refiled, or when the plaintiff delayed in proceeding on the claim). It is precisely because 28 U.S.C. § 1367(d) fails to reach these questions of the plaintiff's conduct in pursuing the first action that it *displaces*, rather than codifies, the California doctrine of equitable tolling.

In addressing equitable tolling, Michaels complains that Wildenstein & Co. erred in saying he never validly invoked the federal court's jurisdiction. (Brief in Opposition at 11, 18.) This is a sensitive point to Michaels because it cuts to the good faith and

diligence requirements of the California equitable tolling doctrine which governs his case.

Michaels invoked the federal court's jurisdiction twice, both times without validity. The first time was June 28, 1993, when Michaels filed a complaint purportedly based on RICO, and the second time was June of 1995, when he filed a second amended complaint purportedly based on diversity jurisdiction. Michaels offers no explanation why, if he were acting diligently and in good faith and his first complaint presented a valid claim under RICO, a statute allowing extraordinary remedies, he would refuse to file a RICO statement as required by the federal court, engage in further delay, and then file a second amended complaint in June of 1995 which makes no reference to RICO. The federal court told him point blank: "when you focused on it, you really didn't have a federal claim. It's not even that the federal claim was dismissed, you withdrew it." (App. D 4.) Similarly, Michaels offers no explanation why, if he were acting diligently and in good faith and his second amended complaint under New York law were supported by diversity jurisdiction, he again delayed and did not proceed with the evidentiary hearing suggested by the federal court to determine diversity jurisdiction. The federal court dismissed the second amended complaint for lack of diversity jurisdiction on October 6, 1995, a dismissal that Michaels does not contend was in error.

The simple truth is that Michaels did not validly invoke the federal court's jurisdiction in either instance but rather needlessly instituted a federal claim which had no merit and then delayed the litigation as long as possible to remain in federal

court. (Petition at 4-5.) Any contrary suggestion by Michaels or the Court of Appeal is simply untenable. Michaels' forum-shopping, and his lack of good faith and diligence, squandered more than two years in federal court. Because of this gamesmanship, Michaels found himself in October of 1995 without a judicial forum for his remaining state law claims which at that time were not even California claims, but New York claims.

As if to justify his conduct in the first action, Michaels repeats the Court of Appeal's statement that Wildenstein & Co. is in the same position as if the case had been filed originally in state court. (Brief in Opposition at 9, 19-20.) This comment is not accurate. To highlight a general problem, a plaintiff knows, because of 28 U.S.C. § 1367(d), that it can forum shop in federal court with a questionable claim and negotiate for settlement, without spending time or resources on trial preparation, while the defendant may be required to prepare for trial. If plaintiff decides the federal forum is not to its liking it can easily secure a dismissal and refile its state claims in state court, with the defendant again being required to prepare for trial but this time in a different forum and under different rules. Wildenstein & Co. was severely prejudiced by all of Michaels' conduct. Had Michaels conducted the litigation in a diligent, good faith manner, he would not have filed seven complaints in three different courts, requiring Wildenstein & Co. to fight a three-front war for well over five years. In 1993 Michaels would not have filed a RICO claim in federal or state court because he never had a RICO claim. In 1995 Michaels would not have filed New York claims, and dropped the

California claims, in his effort to conjure up diversity jurisdiction. Nor in 1997 would Michaels have filed suit with New York claims in the New York Supreme Court, ostensibly to protect himself in the event the California claims were dismissed. As the Los Angeles Superior Court observed at the July, 1998 hearing on Wildenstein & Co.'s motion for summary judgment and as Michaels does not contest, California's "five year rule" for bringing cases to trial or dismissing them had been exceeded based on the June 28, 1993 date Michaels originally filed the action in federal court. (App. E 4.) Cal.Civ.Proc Code § 583.310 (West 1984).

IV. THIS COURT SHOULD DECIDE THE TWO IMPORTANT CONSTITUTIONAL ISSUES PRESENTED BY THE PETITION.

Michaels does not directly respond to Wildenstein & Co.'s argument that subsection (d) of 28 U.S.C. § 1367 involves not the regulation of practice and pleadings in federal courts, which is permitted by *Hanna v. Plumer*, 380 U.S. 460, 472 (1965), but rather the regulation of a state statute of limitations on a purely state law claim *after* it has been dismissed by the federal court and is to be heard in state court.

Instead, Michaels attempts to distance state tolling doctrines from statutes of limitations by saying that subsection (d) of the 1990 supplemental jurisdiction statute does not affect state statutes of limitations in state law cases. (Brief in Opposition at 16.) For this point, Michaels cites a decision which preceded the statute by more than four decades, *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949). In fact, *Ragan* establishes that the diverse rules which

comprise the state's policy on the length of the limitations period are an *integral* part of the "measure" of the state-created cause of action. *Id.*, 337 U.S. at 553-534. Tolling is one such rule. In *Board of Regents, University of New York v. Tomanio*, 446 U.S. 478, 485-486, 487 (1986), this Court concluded that state law provisions regarding tolling, revival and questions of application are virtually always *inter-related* with the chronological length of the limitation period, such period itself being fundamental to a state's "well-ordered judicial system." This inter-relationship of significant state policy interests that cannot be unbundled is precisely what subsection (d) impermissibly targets.

Michaels also cites *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988), but this decision does not in any way support his belief that Congress has the power to enact removal provisions without regard for the effect on state statute of limitations. (Brief in Opposition at 15-16.) The Court simply concluded that the removal statute supports a district court's power to remand state law claims when it chooses not to exercise jurisdiction over them.

As shown by the Petition, subsection (d) of 28 U.S.C. § 1367 infringes on the sovereign right of the state legislatures and courts to determine whether their statutes of limitations shall be strictly enforced in their own courts, or be subject to equitable tolling rules which require the plaintiff to show diligence and good faith throughout the litigation, plaintiff is left without a forum due to forces outside its control, and the defendant would not be prejudiced by tolling. (Petition at 19-21, 23-27, 29-30.) Subsection (d) "add[s] something to the cause of action," *see Ragan*,

337 U.S. at 553-534, by giving it a new life after federal court dismissal even though the state which created the claim might reject it as time-barred because the state strictly enforces its statutes or the plaintiff did not satisfy the state's equitable tolling rules. Lastly, contrary to Michaels' view, subsection (d) is not essential to any federal interest, including an interest in avoiding the "chilling" of federal claims to be filed in federal court. Congress easily could have handed the tolling issue in many acceptable ways without infringing on state sovereignty. (Petition at 25-26.)

Any federal statute which appears to exceed the limits of Congress' Article III powers requires close examination. Subsection (d) of the supplemental jurisdiction statute plainly crosses that line. As a result, this Court's intervention is necessary to restore the essential balance between federal and state law that is protected by the Tenth Amendment and Article IV, § 4 of the Constitution.

V. CONCLUSION

For the reasons stated in the Petition and above, petitioner urges the Court to grant a writ of certiorari in this case.

Respectfully submitted,

DAVID L. BACON
Counsel of Record

CURTIS A. COLE
THELEN REID & PRIEST LLP

Attorneys for Petitioner
WILDENSTEIN & CO., INC.

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